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No. 20334

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IN THE
United States Court of Appeals
For the Ninth Circuit

J. A. WOODWORTH and B. D. ELLIOTT,
Appellants,

v.

TACOMA YACHT CLUB,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANTS

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IN THE
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v.

TACOMA YACHT CLUB,
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This is an appeal from the final decree of the United States District Court for the Western District of Washington, Southern Division, sitting in Admiralty, dismissing the appellants libel on the basis of an alleged hold-harmless or indemnity provision after finding that the negligence of the appellee's servants had caused the loss of appellants' boathouse and other damage.

The jurisdiction of the District Court is conferred by

the provisions of Title 28, USCA, Sec. 1333, which vests jurisdiction of all Admiralty causes in the United States District Courts (Tr. Vol. I, 25-26).

The jurisdiction of this Court is conferred by Title 28, USCA, Sec. 1291, which gives this Court jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE

The appellants are J. A. Woodworth and B. D. Elliott of Tacoma, Washington. At the pertinent times during December, 1961, Mr. Woodworth was owner of the cabin cruiser *Vaja* and Mr. Elliott was the owner of the cabin cruiser *Leilani*. These two boats were kept in a floating boathouse which was owned jointly by the appellants. Both appellants were members of the appellee Yacht Club and rented moorage space for their boathouse from the appellee.

Through their libel filed in the Court below, the appellants claimed damages for the loss of their boathouse and for damage to the two cabin cruisers moored therein when the boathouse drifted into the open waters of Puget Sound on December 17, 1961. Appellants libel claimed, and the Court below found, that the appellants' boathouse had been permitted to go adrift to its destruction through the negligence of the appellee Yacht Club's employees (Tr. Vol. I, 58-59). However, the Trial Court further found that the appellee was shielded from liability by the language of an indemnity or "hold-harmless" provision contained in its membership application form.

By this appeal, the appellants submit that the Trial Court was distinctly in error in concluding that the provision of the Yacht Club's membership application form advanced by the appellee operated to shield it from liability for the loss of appellants' boathouse, and the coincident damage to their boats.

Tacoma Yacht Club Moorage

The Tacoma Yacht Club is situated adjacent to the waters of Commencement Bay, an arm of Puget Sound (Tr. Vol. I, 24). The Yacht Club leases the entire basin (formed by an off-shore slag pile of the American Smelting & Refining Company) from the Tacoma Park Board (Tr. 12). In turn, the appellee subleases approximately the southwestern one-third of that basin to Mr. Charles W. Mojean for use as a moorage open to the public and for a public marine gasoline and oil sales facility (Tr. 12, 88-90). Mojean's public area of the basin is operated as an entity which is entirely independent of the Yacht Club except for his payment of rent under his sublease from the appellee Yacht Club (Tr. 88-93). The remainder of the basin is operated by the Yacht Club for its clubhouse and moorage facilities, including areas rented to members for moorage of their vessels.

For some months prior to December, 1961, the appellants rented a designated moorage space from the Yacht Club for their floating boathouse. The appellants' cruisers, *Vaja* and *Leilani*, were moored in the boathouse which also stored other equipment associated with the appellants' boating activities. In turn, the boathouse was secured in the mooring area by chains of 5/16th inch metal,

spiked into the boathouse on one end, and to the Yacht Club's mooring pilings on the other (Tr. Vol. I, 26).

Movement of Appellants' Boathouse By Appellee's Employees

On December 14, 1961, Lamont C. Doty, the appellee's professional manager, and two other employees of the Yacht Club, working under his supervision, severed the chain moorings of the appellants' boathouse and towed it away from the moorage place rented by the appellants (Tr. Vol. I, 27). The boathouse was towed by Manager Doty's cabin cruiser through means of a line secured about the handrailing at the forward end of the boathouse (as distinguished from the after or open end, through which the boats exited) (Tr. 18). The boathouse was taken from the Yacht Club moorage area to the public gas float operated by Charles Mojean, where it was tied up by use of two $\frac{3}{4}$ -inch-diameter manila lines from the gas float to the forward end of the boathouse (Tr. Vol. I, 27). Appellee's employees state that two additional $\frac{1}{2}$ -inch-diameter ropes were tied from the after end of the boathouse to finger floats in Mojean's public moorage area. Thereafter no one altered the lines or in any other way changed the manner in which the boathouse was secured to Mojean's float (Tr. Vol. I, 27-28).

The Trial Court found that neither appellant authorized the movement of their boathouse by the appellee. Furthermore, the Court found that neither appellant had specific advance notice of the movement nor notice of

the place where the boathouse was to be located after it was moved (Tr. Vol. I, 58).

Loss of the Appellants' Boathouse

A wind storm arose on the evening of December 16, 1961. Available records indicate that gusts reached 35 miles per hour at Seattle-Tacoma Airport and 45 miles per hour at Seattle (Ex. 1, F and G). At 6:30 a.m. on December 17, the appellants' boathouse was discovered to be missing from the temporary moorage at which it had been secured by appellee's employees. At approximately 8 o'clock a.m. the boathouse was sighted floating in the waters of Puget Sound about 7 miles east north-east of the Yacht Club (Tr. Vol. I, 28). Appellants' yachts, *Leilani* and *Vaja*, were still tied inside the boathouse. Thereafter the yachts were removed from the boathouse by the United States Coast Guard and employees of the appellee. The yachts and the boathouse were separately taken in tow in order to return them to shelter. However, the boathouse broke apart by action of the waves, lost its floatation and became a total loss. Its wreckage drifted ashore near the position at which it initially had been sighted at 8:00 a.m. (Tr. Vol. 5, 28). The two yachts were damaged by the action of the waves in the open waters of Puget Sound, but were returned to the vicinity of the Tacoma Yacht Club (Tr. Vol. I, 28, Tr. 110).

Membership Application—Hold-Harmless Provision

The Trial Court found that the damages suffered by the appellants were proximately caused by the neg-

ligence of the appellee's employees (Tr. Vol. I, 58-59). Nevertheless, it exonerated the appellee Yacht Club from liability on the basis of an exculpatory or indemnity provision of the Yacht Club's membership application. In pertinent part that provision reads:

"As partial consideration for membership applied for I hereby agree that I will save the Tacoma Yacht Club harmless from any and all liability in the event of damage and/or loss of any kind or description whatsoever to my boat or other equipment while the same is moored and/or located upon the premises of said Yacht Club..." (Tr. I, 51; Ex. D).

A membership application with the provision set forth above was signed by appellant Woodworth, but there was no evidence that such an agreement was signed by appellant Elliott (Tr. Vol. I, 57). The Yacht Club's application for moorage (Ex. E) also contains a provision which employs "hold-harmless" language. However, that provision is specifically limited to damage caused by the operation of the smelter which lies adjacent to the Yacht Club and does not apply here.

SPECIFICATIONS OF ERROR

Specification No. 1

The Court erred in its entry of Conclusions of Law IV and V in concluding that the appellee was not liable to the appellants because of the non-liability or indemnity provision of its membership application form.

Specification of Error No. 2

As to appellant Elliott, the Trial Court erred in its Conclusions of Law IV and V in failing to allow recovery for his damages because of the provisions of the appellee's membership agreement in view of the Court's Finding of Fact VII that there was no evidence that he ever signed such an agreement.

Specification of Error No. 3

The Trial Court erred in its Finding of Fact V that the public moorage operated by Charles Mojean is a part of the premises of the appellee Yacht Club.

Specification of Error No. 4

The Trial Court having found that the appellee Yacht Club's employees moved the appellants' boathouse and boats without the appellants' knowledge or permission and thereupon negligently moored the same, proximately causing the damage suffered by libelants, the Court erred in its Findings of Fact, Conclusions of Law and its Judgment (Decree), in holding that the appellee is not liable to the appellants.

SUMMARY OF ARGUMENT

The appellants submit that the hold-harmless or exculpatory provision of the appellee's membership application form should not have operated so as to allow the appellee Yacht Club to insulate itself from liability under the facts established in the instant case. The appellants specifically submit that the non-liability provision raised by the appellee was improperly applied by the Trial

Court for each of the following reasons: (1) Under the rule of construction properly applied to indemnity or non-liability provisions, the language advanced by the appellee Yacht Club is not sufficient to relieve it from liability for its own negligence; (2) Upon the evidence, it is clear that the appellants' boats and boathouse were not damaged "on the premises of the Tacoma Yacht Club," but rather on the waters of Puget Sound, and that the "hold-harmless" provision advanced by the appellee by its own terms does not apply to the present cause; (3) By moving appellants' boathouse without permission, the appellee Yacht Club cloaked itself with the duty of bailee. Under the law and public policy of this jurisdiction while standing in that capacity it may not raise a contractual agreement to relieve itself of its liability for its own negligence; and (4) By exercising control over the appellants' boathouse and boats in moving them without the appellants' knowledge or permission, and then allowing the appellants' boathouse to go adrift to its damage and destruction, the appellee Yacht Club converted the same and should be held strictly liable to the appellants.

Each of these rules could, and should, have been applied by the Trial Court in order to reject the non-liability provision raised by the appellee in its defense.

Requirement of Strict Construction of Indemnity or Exculpatory Provisions

There can be no doubt that the law requires an indemnity or hold-harmless provision to be construed most strictly against a party raising such a provision in order

to insulate itself from the effect of its own negligence. Thus, in *United States v. Wallace*, 18 F.2d 20 (1927), this Court stated at page 21:

“The established principle is thought to be that general words alone do not necessarily impart an intent to hold an indemnitor liable to an indemnitee for damages resulting from the sole negligence of the latter; it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in clear and unequivocal terms . . .”

Also see *Ocean Accident & Guarantee Corporation v. Jansen*, (8 Cir. 1953), 203 F.2d 682, and *Sinclair Prairie Oil Company v. Thornley*, (10 Cir. 1942), 127 F.2d 128. This general rule that a tortfeasor may only shield himself from liability to an injured party by contract if the language unequivocally indicates that it is intended to accomplish that end is firmly accepted in admiralty. *The Wash Gray*, (1928), 1928 AMC 923, 277 U.S. 66, 72 L.ed. 266. A most recent example of the application of this strict rule of construction in an admiralty cause appears in *David Crystal, Inc., v. Cunard Steamship Co.*, (2 Cir. 1964), 339 F.2d 295. In that case the Court held a warehouseman accountable for a loss of goods because of what was shown to be a “misdelivery,” as that term is technically defined. In so holding the Court refused to release the warehouseman from liability under a provision of its contract discharging specific acts of its own negligence including “errors in delivery,” since, under strict construction, the “misdelivery” was not an “error in delivery.” The Second Circuit stated that “such disclaimers are not favored by the courts and must be strictly construed.”

**The Appellee Yacht Club's Hold-Harmless Provision
Does Not Relieve It of Liability
For Its Own Negligence**

The provisions of appellee Yacht Club's membership application do not specifically provide that the Yacht Club is to be released from liability for damage arising from its own negligence. Such an explicit release of liability is required in admiralty for such disclaimers to be effective. *Wash Gray, supra*; *David Crystal, Inc., v. Cunard Steamship Co., supra*.

Thus, in *United States v. Wallace, supra*, an admiralty cause, this Court considered the following language indemnifying a shipowner:

"The contractor is to fully protect the ship and the owners against any and all claims for injury to workmen engaged by him or his subcontractor, in carrying out work on the vessel."

Following the pertinent rule of strict construction of such provisions, this Court held that such an undertaking would not release the shipowner from liability for injuries caused solely by the shipowner's own negligence. This Court quoted with approval from *North American Ry. Const. Co. v. Cincinnati Traction Co.*, (7 Cir. 1909) 172 Fed. 214:

"... Indeed it would take clear language to show that a contract of indemnity was intended to cover conditions or operations under the control of the party indemnified and not under the control of the indemnifying party, such, for instance, as accidents, the proximate cause of which is the negligence of the party indemnified."

Furthermore, by the *Wallace* opinion, this Court in admiralty significantly adopts the case of *Perry v. Payne*, 66 Atl. 553, 11 LRA 1173, 10 Anno. Cas. 589 (Sup. Ct. Penn. 1907). In that leading case, the Supreme Court of Pennsylvania, considering an indemnity or exculpatory provision, held that every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and that "No inference from words of general import can establish it." (11 LRA 1173 at 1178).

The appellants submit that, without presumption and inference, the non-liability provision brought into question in this case does not exempt appellee's liability to the appellants. We believe that it is clear by review of the wording that the Trial Court relied upon in reaching its conclusions (Tr. Vol. I, 57) that the appellee Yacht Club should not be shielded from liability for its own negligence.

The Damage Suffered By the Appellants Did Not Occur on the Premises of the Yacht Club

If one were to accept for purposes of argument that the exculpatory provision of the Yacht Club's membership application was adequate to shield it from its own negligence, that provision expressly restricts its application to damage occurring while the appellants' vessels were moored or located on the Yacht Club's premises.

Black's Law Dictionary (4th Edition) defines "damage" as the "loss, injury or deterioration caused by the negligence, design or accident of one person to another in respect to the latter's property."

By the admitted facts in this cause (Tr. Vol. I, 28)

it is clear that the appellants' boathouse and boats suffered damage, not while moored or located on the premises of the Tacoma Yacht Club, but while afloat in the waters of Puget Sound some distance from the club. In fact, the evidence is clear that the appellants' boathouse eventually broke apart and was washed ashore several miles from the club's facilities.

The appellee might have expressly relieved itself from all liability for any damage to appellants' property no matter where that property was situated at the time of its loss. However, the printed membership application form drafted and employed by the appellee specifically applies only to liability for damage occurring while the vessels were located on the premises of the Yacht Club. We submit that the law does not permit a hold-harmless provision expressly applicable to a certain geographical location to be interpreted broadly so as to apply to other locations as well. This point was considered in a recent decision of the Washington State Supreme Court, *Feigenbaum v. Brink*, (Sup. Wash. 1965) 66 Wn.2d 117, 401 P.2d 642, wherein the Court stated:

"In the absence of unequivocal language, the non-liability provision of a contract will not be extended to include areas not specifically described."

Thus, the appellants believe that it is clear, even in the broadest interpretation that can be given to the words employed by the appellee Yacht Club, that the damage suffered by the appellants did not occur on the premises of the Yacht Club. Therefore, appellants submit that it must follow that the Trial Court was in error in apply-

ing that hold-harmless wording to the circumstances of the present cause.

Although the appellants submit that this cause should be resolved upon the fact that the damage to their vessels was incurred on the waters of Puget Sound, the Trial Court attached some importance to the fact that the appellee's negligence arose at the public gas dock which was operated by Mr. Charles Mojean within the Yacht Club basin. The appellants believe that on the evidence the Court was in error in finding that the area of the yacht basin, subleased to Mojean, was the "premises" of the appellee Yacht Club for the purpose of construction of its hold-harmless provision (Tr. Vol. I, 56-57).

Both witnesses Mojean and Doty testified that the area of the public moorage and "gas dock" operated by Mojean was subleased to him by the Yacht Club. Their testimony indicated that Mojean ran a private business unrelated to, and uncontrolled by the Yacht Club. The relationship of the Yacht Club to Mojean's business is concisely stated by Mojean's own testimony:

"Q. (By Mr. Giese) Every activity you pursue in any way concerning your public gas float is entirely independent of the Yacht Club?

"A. (By Mr. Mojean) That is right, sir." (Tr. 90)

The term "on the premises of" is a phrase of restricted meaning. As applied to the location of a business, in normal usage the phrase refers to that area where the business is conducted and does not apply to adjoining property, even if owned by the same party. *Hopkins v.*

State Industrial Accident Commission, (Sup. Ct. Ore. 1938), 83 P.2d 487, 491, 160 Ore. 95; *Mangold v. American Ins. Co. of Newark, N. J.*, (Sup. Ct. Nebr. 1916), 157 N.W. 632, 99 Nebr. 656. And the phrase "on the premises of" excludes adjacent property not under control of the designated party. *Treasure Island Catering Co. v. State Board*, (Sup. Ct. Cal. 1940), 120 P.2d 1, 3, 19 Cal. App.2d 181; *Cohen v. Simon Strauss*, (N. Y. Sup. 1913), 193 NYS 929, 931. In the latter case a space three feet below the floor of one tenant's rented area was held to be the premises of another tenant, and therefore outside the premises of the first.

In *Vairada v. State*, (Wisc. Sup. 1923), 195 N.W. 937, 182 Wisc. 309, the Court considered the relation of the term "on the premises" (as employed in a criminal statute) to a lessor's interest in a leased or subleased premise. There it was held that the sublet area would not be the "premises" of the lessor unless he continued to exercise dominion and control over that area to the extent of freely carrying on his business there.

The appellants submit that the Court erred in not finding that the premises of the appellee did not extend to the area subleased to Charles Mojean.

Appellee's Liability In Bailment

Again accepting for purposes of argument that the exculpatory provision of Yacht Club's contracts would effectively relieve it of responsibility for its own negligence, the appellee stood as a bailee of appellants' vessels. In that capacity the law of the State of Washington prevents the appellee from enforcing its hold-

harmless provision, as a matter of public policy.

A corporation taking custody of a vessel for purposes permitting a benefit to it becomes the bailee of that vessel. *Guard*, (9th Cir. 1935) 1936 AMC 250, 79 F.2d 802; *Yacht Mable H.*, (SD Ala. 1960), 1961 AMC 1299, 187 Fed. Supp. 528; *Lackritz v. Petersen*, (SDNY 1940), 31 Fed. Supp. 415.

While appellee may take the position that it was merely a rentor or lessor of space and was not a bailee, it is clear that, by moving the appellants' vessels without notice or permission, the appellee became a bailee. An exactly parallel situation was considered by courts of the State of Louisiana in *LeWallen v. Board Levee Com'rs. of Orleans L. Dist.*, (La. App. 1964), 166 So.2d 566. The facts in the *LeWallen* case involving damage to an airplane are surprisingly analogous to those of the present cause. For that reason we would indulge in a quotation of some length from pages 567 and 568 of that opinion:

"This suit was brought for recovery of damages based upon the allegation that the defendants became bailees of the airplane when they moved it to the new location, and that as bailee for their own benefit and convenience they owed a duty of protection of plaintiffs' property which they did not owe as lessors of rented space. It is charged that defendants were negligent in that they did not tie down the plane adequately and, specifically, that old and rotten ropes of insufficient size were used. Further, plaintiffs allege that United States Weather Bureau had issued a warning of the possibility of severe winds in the area in sufficient time for defendant to take precautionary measures, but that none were taken.

"The defendant Board of Levee Com'rs. denies that a contract of bailment existed, but rather one of lease and that it owed no duty of protection of plaintiffs' property as a bailee or as a depository. It also denied negligence in moving the plane or in the manner it was tied down. Defendant further pleads the negligence of plaintiff Munson who was aware of the plane's removal and inspected it on the new location without complaint of the manner in which it had been secured to their tie-down rings, and who, in effect, acquiesced in all the defendant's employees had done. Plaintiffs deny their contributory negligence, asserting that they had a right to rely on the airport authorities who are presumed to be experienced in such matters.

* * *

"In order to determine what duty defendant owed plaintiffs for protection of their plane, it is necessary to ascertain the nature of the contract between them. Initially there was a simple contract of lease of space for storage of plaintiffs' plane. Such contracts appear to be common and in due course of the operations of the airport. *When the defendant's employees took it upon themselves to move the plane to a different location, one of their own choosing, for their own convenience or benefit, the contract then became one of bailment.* The defendants put themselves in a position analogous to an automobile parking lot or storage garage which exercises control over the vehicle left in storage."

The law of the State of Washington is in agreement with the general rule as stated by *LeWallen v. Board of Levy Com'rs., supra*. Thus, in *Spare v. Belroy Housing Corporation*, 179 Wash. 385 (1935), landlord Belroy contended that he merely leased space for tenants to park their automobiles. On evidence that the automobiles were moved by the landlord's employee it

was held that such action had caused a bailment of the autos in question to the landlord.

The appellants submit that on its facts the present cause falls squarely within this rule, creating a bailment in appellee as to their vessels at the time of their damage. Thus, under the law of this jurisdiction the hold-harmless or exculpatory provisions of appellee's membership contract would be invalid.

"It is well settled that a bailee may be contract exempt himself from liability *except for his own fraud or negligence.*" *Patterson v. Wenatchee Canning Co.*, 59 Wash. 556, at 558 (1910).

This rule is firmly established as the law of the state. *Frank Althoff v. System Garages, Inc.*, (Sup. Wash. 1962) 59 Wn.2d 860, 371 P.2d 48; *Ramsden v. Grimshaw*, (Sup. Wash. 1945) 23 Wn.2d 864, 162 P.2d 901; *Sporsem v. First Nat. Bank*, (Sup. Wash. 1925), 233 Pac. 641, 133 Wash. 199.

Appellee's Absolute Liability in Conversion

The Trial Court found that the appellee's employees moved the appellants' boathouse without permission. Thereafter, the appellants' boathouse went adrift from the temporary moorage because of the appellee's negligence and was totally lost while the boats moored therein were damaged. Appellants submit that under these facts the appellee has converted the appellants' property and would be absolutely liable for the resultant damages. See Restatement of Torts, Sec. 227 (1), and leading cases as to conversion in this context such as *Ryan v. Chown*, 125 NW 46 (Sup. Ct. Mich. 1910).

The rule of conversion of property by a holder

through unauthorized use is recognized in admiralty. It has been held that taking possession of a vessel without authority of its owners, and the subsequent destruction or disposition of it, is a conversion permitting damages to the owner. *Grauwiler v. King*, (EDNY) 1955 AMC 1236, 131 F. Supp. 630, *affd.* (2d Cir.) 1956 AMC 319, 229 F.2d 153; *J. Oswald Boyd*, (ED Mich.), 1944 AMC 543, 53 F. Supp. 103.

Inapplicability of Non-Liability Provision as to Appellant Elliott

The evidence indicated, and the Court specifically found (Tr. Vol. I, 57), that appellant Elliott had not executed a membership application form incorporating the language upon which the appellee relies. It would seem that the appellee thereby failed in its burden of proof that the language in the membership application form could validly apply to its liability to Mr. Elliott. Furthermore, by analogy to the Statute of Frauds, the Trial Court committed error in implying that an agreement between appellant Elliott and the appellee incorporated a provision indemnifying the Yacht Club for its own negligence. Such an agreement would be a contract to answer for the "default" of another which is void under the Statute of Frauds. (In the State of Washington, RCW 19.36.020.) It is clear that an oral or implied agreement to answer for the torts of another is invalid and unenforceable. *Baker v. Morris*, (Sup. Kans. 1885), 7 Pac. 267, 33 Kans. 580; 31 CJS Statute of Frauds, Sec. 13; Corbin on Contracts, Sec. 247, pgs. 216-217.

CONCLUSION

The appellants believe that the result in the Trial Court is in error to the extent that it permits the respondent Yacht Club to exculpate itself from the effects of its own negligence through the provisions of its membership application. Any of several alternative rules of law should have been applied by the Trial Court, to avoid the application of the non-liability language of the Yacht Club's membership form:

(1) The exculpatory language of the membership application was insufficient to constitute a contract allowing the Yacht Club to avoid the effect of its own negligence.

(2) Even if it were a proper disclaimer of negligence, under appropriate construction the exculpatory language does not apply to the facts of the present cause since the damage for which the appellants seek remedy did not occur on the "premises" of the Yacht Club.

(3) As a matter of law the appellee Yacht Club was barred from employing the said exculpatory language because it had assumed the duties of a bailee of appellants' vessels.

(4) In moving the appellants' vessels without permission, the appellee converted them.

(5) As to appellant Elliott, the exculpatory provision is invalid as he did not sign it and his execution of it may not be implied.

Upon each of these grounds the appellants submit that the Trial Court's decree should be reversed, and

that a decree should be entered in the appellants' favor for the damages found in the Court below.

Respectfully submitted,

RICHARD F. ALLEN

EVANS, McLAREN, LANE, POWELL & MOSS
Proctors for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

RICHARD F. ALLEN

of Proctors for Appellants

20334

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

J. A. WOODWORTH and B. D. ELLIOTT,

Appellants,

v.

TACOMA YACHT CLUB,

Appellee.

FEB 7 1967

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

DAVIES, PEARSON, ANDERSON & PEARSON
VINCENT L. GADBOW

Office and Post Office Address:

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Tacoma, Washington 98402

Proctors for Appellee

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HONORABLE GEORGE H. BOLDT, *Judge*

COUNTER STATEMENT OF THE CASE

The TACOMA YACHT CLUB was and is a non-profit corporation, organized under the laws of the State of Washington, for the prime purpose of providing moorage to members at a minimum of expense, and with a maximum of convenience and social advantages. The By-Laws of the Yacht Club vested authority to govern the affairs of the membership in a Board of

Trustees; rules and regulations governing the operation and maintenance of the club and moorage were adopted by the Board of Trustees. (Tr. 121-123)

Regulations and conditions for wharfage had been adopted by the Board of Trustees of the Yacht Club which were in force at all times during the loss in questions here, and had been in force for many years. The application for membership form and the wharfage agreement contained an exculpatory clause relieving the Yacht Club for liability for damage to the members' property occurring on the premises of the Yacht Club (R-38. Ex. 2, 3, and 4) (Tr. 124-126). This agreement between the Yacht Club and its members had been a regulation of the Board of Trustees for many years. (Tr. 131-132)

The customary and usual method for the Yacht Club to notify its members of its operation was through the use of a bulletin board and a monthly publication sent to each member. (Tr. 123-124, R-38, Ex. 5).

THE TACOMA YACHT CLUB leased from the Metropolitan Park Board a boat basin, the entire area between a county ferry dock and the Tacoma Smelter. A portion of this area has a dock which was used, under agreement with the Yacht Club, as a public moorage by Charles Mojean, himself a Yacht Club member. The facilities are owned by the Yacht Club. (Tr. 11-12). (Tr. 88 ff).

The Appellants had moored at the Yacht Club their boathouse containing two yachts, WOOD-

WORTH's *Vaja*, and ELLIOTT's *Leilani*. During December, 1961, because of pile driving being done in the vicinity of the Appellant's moorage berth, the boathouse was moved to a temporary moorage on Mojean's float. The move was made after the members were notified in the monthly publication, *The Lubberline*. (Ex. 5). On December 14, 1961, the boathouse was moved by Yacht Club employees. On the night of December 16, 1961, the boathouse broke loose from its moorings in a high wind and was carried out into the bay where it broke up, causing the loss of the boathouse, damage to the yachts, and the loss of boat gear. The Appellants were partners in the ownership of the boat-house. (Tr. 53 ff, L. 23) (Tr. 71, L. 21).

The Appellants were both members of the Yacht Club, J. A. WOODWORTH since 1959 or 1960 (Tr. 41, L. 18-19), and B. D. ELLIOTT since 1932 (Tr. 72, L. 14). The latter had served as a Board of Trustees member and had helped write the rules and regulations pertaining to moorage (Tr. 8, L. 17-24).

Both WOODWORTH and ELLIOTT received the monthly publication regularly (Tr. 76, L. 22-23) (Tr. 50, L. 3-5). ELLIOTT knew that boathouses were being moved to temporary moorage when he attended a Coast Guard Auxiliary meeting at the Yacht Club about December 12th (Tr. 77, L. 8 ff). WOODWORTH knew the boathouse had been moved when he went fishing the day before the accident on December 16th and found his and ELLIOTT'S boathouse moored at Mojean's dock (Tr. 43, L. 17-24). WOODWORTH also

knew there was some work going on around the Yacht Club and knew why the boathouse was moved (Tr. 43, L. 20-24).

After receipt of *The Lubberline* and the discussion about the move at the Coast Guard meeting, ELLIOTT did not contact the Yacht Club about this move. After receipt of *The Lubberline* and actual notice of the move when he visited the boathouse, WOODWORTH did not contact the Yacht Club either.

QUESTIONS PRESENTED

1. Was the Court correct in enforcing the indemnity provisions adopted as regulations and conditions of membership in the Yacht Club against WOODWORTH, who actually signed instruments containing the provision, and against ELLIOTT, who accepted the provision as a condition of membership, although there is no written evidence of his signing the instruments?

2. Was the Court correct in finding that the area of the basin in which Mojean operated a public float was a part of the premises of the Yacht Club?

3. Was the Court correct in finding that the boat-house was moved without permission or authority?

4. Was the Court correct in finding WOODWORTH and ELLIOTT free of negligence themselves?

SUMMARY OF ARGUMENT

The Appellee submits that the indemnity provisions of the Yacht Club's conditions for membership are a valid and enforceable exculpatory clause, in this particular relationship, that between a non-profit corporation and its members. It serves a valid and necessary function, and, in effect, serves to make the members self-insurers to reduce the expenses of operation of the club. The Appellee further submits that the "premises" as between the Yacht Club and its members, included its entire leased area with the public dock area.

The Appellee urges also that the Appellants should not recover, even though the Court should invalidate the indemnity regulations, for the reason that both Appellants had notice of the boathouse move, impliedly consented to it, did nothing to direct the Yacht Club about a preferred moorage, and finally, actually saw, through the partner, WOODWORTH, the boathouse with its moorings before the accident when the storm was already beginning.

Either because of the indemnity provisions, or the equal fault of the Appellants in not caring for their boathouse, with notice of the moorings and the weather, the Courts' decision should be affirmed.

THE VALIDITY OF THE INDEMNITY REGULATION OR CONDITION

As a private, non-profit wharfinger, the respondent can place whatever conditions it desires on membership and a member's privilege of using its facilities. These conditions are determined by the contract, express or implied, between the parties. The libelants are bound by the provisions for membership and wharfage agreement, and assume all risk of damage to their property resulting from even the negligence, if any, of the respondent.

56 Am. Jur. "Wharves" Section 15, page 1075:

"Rights, duties, and liabilities in respect of wharfage services and accommodations may depend upon or be affected by the character or status of the wharf as public or private . . . If private, the owner has the right to the exclusive use and enjoyment thereof, or to permit such other persons to enjoy it, and upon such terms, as he thinks proper, the rights of the parties being ordinarily dependent upon and governed by contract, express or implied."

38 Am. Jur., "Negligence", Section 8, page 649:

"A contract exempting a person from liability for future negligent acts is subject to the objection that it tends to induce a want of care, and such agreements are often declared invalid on the grounds of public policy. Much depends upon the positions of the contracting parties. If they do not stand on a footing of equality, so that one is compelled to submit to a stipulation relieving the other from liability for future negligence, the stipulation is invalid. Again, much depends upon the

nature of the duty involved. No person can by contract relieve himself of a duty imposed upon him by law for the benefit of the public independently of the contract. On the other hand, situations may exist where the relationship of the parties is such as to compel recognition of the validity of a contract limiting liability for negligence. In fact, it is said that contracts against liability for negligence are valid except in those cases where a public interest is involved."

38 Am. Jur., "Negligence", Section 8, 1964 Cum. Supp., page 56, 175 ALR 8:

"When it comes to the question of measuring the relative bargaining power of the parties no definite rules exist to guide the courts. While never referred to expressly, two factors seem to be outstanding as of primary consequence: the importance which the subject matter of the contract has for the physical or economic well-being of the party agreeing to release the other party from liability for the latter's negligence, measured not in terms of individual but of class importance, and the existence and extent of competition among the group to which the party to be exempted by the clause belongs, measured by the amount of free choice the party can actually exercise who is to agree to the exemption."

Griffiths v. Henry Broderick, Inc., 27 Wn.(2d) 901 (1947).

Since there is no public right or duty involved here, the bargaining positions of the parties are equal, and the contractual exemption of liability is for the benefit of all of the members, the conditions of wharfage set forth in the application and wharfage agreement should preclude the libelants from recovery.

The Washington Court is one jurisdiction which upholds the validity of indemnity agreements or exculpatory provisions in such contracts; in fact, the trend of modern decisions is to broaden the areas of validity of these agreements, rather than restrict them.

“According to the great weight of modern authority, the parties to indemnity contracts may validly bind themselves by contract to indemnify the indemnitee against or relieve from liability on account of his own future acts. Some of the courts in reaching this result stress the analogy between these contracts and insurance policies, especially automobile insurance policies, or liability statutes, while others reach the same result independently, as by referring to the principle of freedom of contract, or by simply stating that such contracts do not violate public policy. Again the contention that such contracts are an inducement to negligence has been rejected ‘fanciful’, and untenable in view of the many automobile liability insurance policies in existence.”

27 Am. Jur., “Indemnity”, Section 9, 1964 Supp., page 161.

The State of Washington is in accord with this view. The leading case in Washington, the subject of an annotation in 175 ALR 8, dealt with the following indemnity provision in a management contract between a property owner and a management agent:

“. . . And I further agree to save and hold Henry Broderick, Inc., harmless of and from any and all loss, damage or injury to any person or persons whomsoever, or property, arising from any cause or for any reason whatsoever in or about said premises.”

Griffiths v. Henry Broderick, Inc., 27 Wn.(2d) 901 (1947).

In considering the contentions of the property owner that the provision did not exculpate the manager from its own negligence, because the word was not specifically mentioned, and that the provisions were void as against public policy, the Court stated:

“In our opinion, there can be no doubt but that a loss, damage or injury occasioned by negligence is clearly within the . . . language of the indemnity provision . . .”

Griffiths v. Henry Broderick, Inc., *supra*, page 906.

With reference to the provision being against public policy, the Court gives a thorough and detailed analysis of the theory of such provisions and concludes that such a provision is valid and enforceable. As a basis for upholding such contractual provisions, the Court stated:

“The basis of the broad rules prevailing in some jurisdictions, that one cannot validly contract for indemnity for the consequences of his own negligence, is the theory that the inevitable tendency of such a contract is to promote negligence, or, concretely to apply the rule to the instant case, it is contended that the contract involved here would inevitably tend to make Henry Broderick, Inc., less careful than it would have been had the contract not contained the indemnity provision. Hence, it is asserted that the indemnity provision is invalid.

“It must become apparent, upon reflection, that the theory upon which the rule is based is

not recognized in many analogous situations. For example, thousands upon thousands of trucks and automobiles are continually operating upon our streets and highways whose owners have indemnity contracts as to injuries which they may negligently inflict upon the person or property of the members of the public. Many automobile owners hold such contracts protecting them from the results of their own negligence, up to twenty-five thousand dollars with respect to the injury of one person, and fifty thousand dollars as to persons injured in any one accident. They have contracted for full indemnity against injuries caused by their own negligence, and the validity of such contracts is unquestioned.

“In the case of *Northern Pac. R. Co. v. Thornton Bros. Co.*, 206 Minn. 193, 288 N.W. 226, wherein a contractor agreed to indemnify a railroad against any liability it might incur from damages to third persons as a consequence of its own negligence, the Supreme Court of Minnesota, in holding the contract valid, said:

‘Quite fanciful is the suggestion that to hold as we do is “‘to put a premium on negligence rather than to discourage it.’” See note, 23 Virginia L. Rev. 85, 86 . . .’

‘Neither law nor public policy prevents the ordinary contractor from buying from a third party indemnity from the pecuniary result of his own negligence. *That is legitimate as insurance. How does the same process, with identical result, become illicit simply because they are those of the original and basic contract rather than a collateral one for conventional insurance?* See 19 Minn. L. Rev. 471; 22 Id. 107.” (Italics theirs).

Griffiths v. Broderick, Inc., supra, pp. 907-908.

The respondent contends that both libelants are subject to the exculpatory provisions of the conditions of membership in the Yacht Club, and should be denied recovery in this action on the grounds that the respondent is a private wharfinger, not a professional bailee, and can set any legally valid conditions upon membership and use of the club facilities.

The respondent is a non-profit corporation set up for recreational and social objectives. Its wharfage rate is approximately one-third lower than public facility rates because of the non-profit objective and the low insurance rates afforded by the indemnity agreement. Its By-Laws provide that membership extends privileges to members subject to the rules and regulations of the Board of Trustees. Its rules and regulations set forth in the membership application, and wharfage agreement provide as follows:

“As partial consideration for membership applied for, I hereby agree that I will save the Tacoma Yacht Club harmless from any and all liability in the event of damage and/or loss of any kind or description whatsoever to my boat or other equipment while the same is moored and/or located upon the premises of the said yacht club . . .” (Application form).

“The member occupying the berth must provide and maintain adequate mooring lines and see that the boat is securely moored. If this is not complied with, the port captain may have the condition corrected at the member’s expense.” (Application for Moorage form, provision No. 14).

“In case of emergency or disaster threatening injury to persons or property, any employee or

member of the club present is authorized to take such steps as may be deemed necessary to meet such emergency or disaster, and no liability therefor shall be incurred by the club, or the individual concerned." (Application for Moorage form, provision No. 16).

"The responsibility for the care and safety of my boat shall be upon myself at all times, and no action of or service by any employee or officer of the club shall in any way be construed as an acceptance by the club of any such responsibility." (Application for Moorage form, concluding recital).

The actual moorage agreement with its rules and regulations promulgated by the Board of Trustees contains provisions of like nature which the libelants as members of the club are bound by. The regular notice of December, 1961, that boathouses in the area were to be moved, gave the libelants sufficient notice to move the boat or let it be moved at their risk.

The rules supporting the contention of the respondent that the rules and regulations of the respondent are valid and should be enforced against both libelants are as follows:

"Indemnity springs from a contract, express or implied. It may be oral . . . when the requisite intention appears, no particular form of agreement is necessary."

27 Am. Jur., "Indemnity", Section 6, page 458.

"The question of construction is usually one of law for the court applying recognized rules of construction. The cardinal rule is to ascertain

the intentions of the parties and to give effect to that intention if it can be done consistently with legal principles.”

27 Am. Jur., “Indemnity”, Section 13, page 462.

Washington law applies to the construction of the contractual relations of those parties.

Air Transport Assoc. v. U.S., 221 F.(2d) 467 (1955).

“Negligence” as a specific item of the contract need not be set forth in the indemnity provision.

Griffiths v. Henry Broderick, Inc., supra.

It is significant that the cases cited by the libelants are those involving public wharfingers, professional bailees, or contracts for profit (repair or towage). It is well accepted that exculpatory provisions in such contracts are void as contrary to public policy, but we have here a private, non-commercial arrangement for lease of moorage space, to take advantage of which the applicants agree to be, in effect, self-insurers, even against the negligence of the landlord. The indemnity provisions here are similar to those in the *Griffiths v. Broderick* case. Situations analogous to this have from time to time been upheld by the courts in recent cases. Witness the following:

Union Pacific Railroad Co. v. Ross Transfer Company, 64 Wn. Dec. 2d p. 497 (1964); *Fire Association of Philadelphia v. Allis Chalmers Manufacturing Co.*,

120 F. Supp. 335 (1955); *Rice v. Pennsylvania R. Co.*, 202 F.(2d) 861 (1953); *Jacksonville Terminal Co. v. Railway Express Agency*, 296 F.(2d) 256 (1962); *Tide-water Field Warehouses v. Fred Whitaker Co.*, 370 Pa. 538, 88 A.(2d) 796 (1952); *General Accident, Fire and Life Assur. Corp. v. Smith and Oby Co.*, (CA 6 Ohio) 272 P.(2d) 581, 77 ALR 2d 1134, 1142 (1959).

Since we have here a private wharfinger whose relations with its members are governed by contract, express or implied, there is no public interest involved, and the members voluntarily accept membership in a non-profit corporation—subject as the By-Laws recite to its rules and regulations—this case falls within the principles of law set forth in the *Griffiths v. Broderick* case, *supra*. The exculpatory provisions promulgated by the Board of Trustees as conditions of membership should be enforced against the libelants and they should be denied recovery in this action.

THE LOCATION OF THE DAMAGE: PREMISES

Appellants' argument that the damage occurred away from the "premises" because the boathouse broke up in the bay is specious, and fails to consider a fundamental principle of law that the place of the wrong is the situs of a tort action. In a recent case this argument was used by an insurer to deny liability for wrongful death under a provision excluding coverage while the insured's watercraft was away from the "premises". The Court held that under a general liability

policy excluding from coverage accidents occurring while the insured watercraft was away from the assured's premises, the insurer would be liable for wrongful death sustained when the watercraft capsized several miles away from the assured's premises since the dispatching of the watercraft by the assured, despite adverse weather warnings, caused the accident; the wrongful act is the deciding factor—not the place where the actual damage occurred.

Amer. Emp. Ins. Co. v. Goble Aircraft Specialties, 131 NYS 2d 393, 205 Misc. 1066, withdrawn 154 NYS 2d 835, 1 A.D. 2d 2008.

The objective in the construction of a provision such as this is to determine the intent of the parties, just as it is in any other contract.

“The actual intent and meaning at the time of executing the indemnity agreement must be deduced from the entire contract, the subject matter, the purpose of execution and the surrounding circumstances. Words in a contract of indemnity are given an ordinary meaning.”

Keystone Tankship Corp. v. Willamette Iron & Steel Co., 222 F. Supp. 320 (1963).

“Indemnity agreements should not be given an unduly liberal or harshly strict construction, but a fair construction that will accomplish its stated purpose.”

Chicago, Minneapolis, St. Paul & Pacific Railroad Co. v. Famous Brands, Inc., 324 F. 2d 137 (1963).

In applying these rules of construction to the exculpatory provisions in this contract and directing attention to the argument of the libelants that the damage here occurred off the premises owned by the Yacht Club, we believe that the Court's finding that the premises as used in this contract includes the Mojean dock area is correct.

“The word ‘premises’ as used in leases has a varied meaning depending upon the context and object to which it is applied and the Court, after considering the language of the instrument itself, considers the nature of the building and surrounding property and general purposes of the parties in order to determine what constitutes the premises.”

Jackson v. Birgfeld, 56 A. 2d 793.

It is well established in the law that the possession of a subtenant is the possession of the lessor.

51 C.J.S., *Landlord and Tenant*, Sec. 254, p. 893.

Between Mojean and the respondent in the proper case, the question of a strict demarcation between Mojean's premises and the respondent's premises could be raised, but as between the respondent and the libelants, the premises are those which are owned by the respondent. There is no question but that the intent of the parties to this membership and wharfage contract was to include the leased area described by the Court in Paragraph V of its Findings of Fact.

BAILMENT AND CONVERSION

The Appellee assigns error to the Court's Finding that the Appellants did not authorize nor did they have notice of the Yacht Club's changing the moorage of their boathouse (R-58). Set forth in the Counter Statement of the Case are facts upon which the Court should have found that the Appellants had the usual and customary notice of events affecting their property. Both received the *Lubberline* notice; ELLIOTT discussed the move at the Coast Guard meeting prior to the move; WOODWORTH saw the boat and moorings the day before the accident. All of these facts were undisputed and uncontradicted, and should have been sufficient for the Court to find implied, if not actual, notice. Based upon these facts, the Yacht Club had permission through a condition or provision contained in the Moorage Agreement, as follows:

"In case of emergency or disaster threatening injury to persons or property, any employee or member of the club present is authorized to take such steps as may be deemed necessary to meet such emergency or disaster, and no liability therefor shall be incurred by the club." (Wharfage Agreement) (R-38 Ex. 3).

Under these facts there was no conversion. The respondent by moving the boathouse acted in accordance with its contractual agreement with the libelants and merely continued its custody of the boathouse in attempting to keep it from becoming damaged from the construction of piling. At the most, the respondent became a bailee of the boathouse for the purpose of

its move. This argument again supports the finding of the Court that respondents were negligent, but does not create a relationship that exempts the libelants from the application of the indemnity provisions. This would not make the respondent a professional bailee analogous to a wharfinger which served the general public. The respondent remains a private wharfinger whose relationships with its members continued to be governed by the contract.

APPELLANTS' NEGLIGENCE

The Appellee assigns error to the Court's finding that WOODWORTH is excused from his notice of the moorings and danger from the rising wind by his lack of boating experience.

WOODWORTH was aware of the coming storm. (Tr. 45, L. 6-11) (Tr. 46, L. 6-9). He saw the mooring lines on the boathouse. (Tr. 58, L. 4-7). He came in from fishing because it was rough. (Tr. 58, L. 20-21). He doubted the adequacy of the mooring lines when he came in. (Tr. 59, L. 8) (Tr. 61, L. 12-16). He felt when he saw the moorings that the railings were inadequate to moor the boathouse. (Tr. 62, L. 11-14) (Tr. 63, L. 12-18) (Tr. 64-65). He testified that the moorings were inadequate. (Tr. 65, L. 21-22). WOODWORTH did nothing to insure the adequacy of these moorings.

As a partner of ELLIOTT, WOODWORTH's notice of the danger was notice to ELLIOTT.

R.C.W. 25.04.090. Partner is an agent of the partnership for partnership business.

R.C.W. 25.04.120:

"Partnership charged with knowledge of or notice to Partner. Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of fraud on the partnership committed by or with the consent of that partner."

The Appellee contends that the Lower Court's decision should be affirmed, either because of the operation of the indemnity provisions of the membership regulations, or because the Appellants were equally at fault in having notice of the danger and failing to act diligently to protect their own property.

Respectfully submitted,

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TACOMA YACHT CLUB,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

APPELLANTS' REPLY BRIEF

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IN THE
**United States Court of Appeals
For the Ninth Circuit**

No. 20334

J. A. WOODWORTH and B. D. ELLIOTT,
Appellants,

v.

TACOMA YACHT CLUB,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

APPELLANTS' REPLY BRIEF

ARGUMENT IN REPLY

**Appellee's Status as a Non-Profit Private Club Does Not
Affect Its Potential Tort Liability to Its Members**

The appellee Yacht Club emphasizes its status as a private club organized as a non-profit corporation. The tenor and direct implication of its argument is that such status should be given some special consideration in determining liability. Without citation of authority, its brief invites the conclusion that a private Yacht Club is immunized from the principles of liability which other corporations must bear with relation to the negligence of their employees. However, the implication thus sug-

gested by the appellee's brief does not accord with the law.

It is clear in the law of the State of Washington that even a non-profit charitable corporation is as fully exposed to liability for its employees' negligence as any other corporation would be. *Friend v. Cove Methodist Church, Inc.*, 396 P.2d 546, 65 Wn.2d 165 (Sup. Ct. Wash., 1964). It necessarily follows that if a non-profit charitable corporation is fully liable in negligence even to its non-paying beneficiaries, the appellee Yacht Club is subject to the same generally applicable principles of law when its employees negligently damage the property of a member who pays for the use of its facilities.

Appellants would note that there is no public policy consideration whatsoever which favors incorporated non-profit clubs, and appellee cites no authority to that effect. Such organizations are liable to their members for any negligence causing damage to those members. Thus, as libelants do here, any member of a private, incorporated club has a clear right to recover from the club for its negligence. *Barnes v. Labor Hall Assoc.*, 319 P.2d 554, 51 Wn.2d 421, (Sup. Ct. Wash., 1958); also see 14 C.J.S. *Clubs*, Sec. 27. Although the appellee suggests a contrary standard, which is not specified with any particularity, the appellants submit that appellee's status as a private non-profit club in no way exonerates it from liability to its members and thus, the repeated allusions to this status are wholly irrelevant.

Strict Construction of Indemnity or Exculpatory Provisions

The appellee Yacht Club quotes from two cases, *Keystone S. S. Corp. v. Willamette Iron & Steel Co.*, 222 F. Supp. 320 (DC Ore., 1963) and *Chicago, M., St. P. & P. R. Co. v. Famous Brands, Inc.*, 324 F.2d 137 (8 Cir., 1963) to the effect that the rule of strict construction should not be applied to indemnity or exculpatory provisions, such as that raised here to shield it from liability for its own negligence. The initial brief of appellants cites sufficient authority to confirm that the principle of strict construction is applicable to such agreements. However, since the appellee quotes at length from the Washington case of *Griffiths v. Henry Broderick, Inc.*, 182 P.2d 18, 27 Wn.2d 901, 175 A.L.R. 1 (Sup. Ct. Wash., 1947), we should note that the Washington Supreme Court there stated:

“* * * ‘It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him from his own negligent acts, where such intention is not expressed in unequivocal terms.’

“There is no doubt but that this rule is well settled. But we think the author * * * meant no more than that the rule in such situations is that doubts, if any, should be resolved in favor of the indemnitor. * * *”

In fact, strict construction of an indemnity provision such as is asked by appellants here was employed by the Washington court in its most recent opinion considering this point. *Feigenbaum v. Brink*, 66 Wn.2d 117 (Sup. Ct., Wash., 1965).

Appellants also would note that neither the *Keystone Steamship* nor the *Famous Brands* cases from which appellee quotes are pertinent to the present cause. *Keystone Steamship Corp. v. Willamette Iron & Steel Co.* does not involve a situation where a party raising an indemnity provision thereby seeks to relieve itself of its own negligence, and thus is basically distinguishable from the cases cited by appellants' initial brief, and from the present cause. Furthermore, the passage appellee quotes from *Famous Brands* is grossly out of context, a portion of the sentence being omitted (without indication of that omission in the appellee's brief). A full quotation, with the portion omitted by appellee now italicized, reads:

“*The parties also agree that under Minnesota law indemnity agreements should not be given ‘an unduly liberal or harshly strict construction but a fair construction will accomplish its stated purpose.’*”

Since the *Famous Brands* case does not purport to state a rule of construction applicable either to causes in Admiralty generally or operative under the precedents in the State of Washington, the quotation from it is wholly inappropriate.

Applicability of the Exculpatory Language

The appellee sets forth (Appellee's Brief, pps. 11 and 12) four separate provisions excerpted from the language of its Membership Application (Ex. D) and from its Application for Moorage (Ex. E).

Appellants' initial brief states authority supporting the rule that a tortfeasor may only shield itself from liability

to an injured party by contract if the contract language expressly indicates in clear and unequivocal terms that it is intended to accomplish that end. In reviewing the three provisions excerpted by the appellee from its Application for Moorage form, and by review of that form itself (Ex. E) it is apparent that none of these provisions constitutes an indemnity or exculpatory agreement. Thus, only the single provision extracted from the reverse side of the Membership Application form (Ex. D) could even purport to be a hold-harmless or indemnity agreement. It is that provision which is principally discussed by appellants' initial brief.

This single pertinent clause from the Membership Application is to the effect that the member agrees to hold the appellee Yacht Club harmless "in the event of damage and/or loss of any kind or description whatsoever to my boat or other equipment while the same is moored and/or located upon the premises of the said Yacht Club * * *." In this regard the appellants submit, first that the hold harmless provision is not adequate or sufficient in its wording to constitute a "clear and unequivocal" undertaking to relieve the Yacht Club of liability for the consequences of its own negligence causing damage to a member's property, and secondly, that even if it were by its own terms, this provision does not extend to the loss suffered by the appellants which did not occur on the premises of the Yacht Club.

The appellee Yacht Club's argument that the language or the proffered application form provision saves it from

liability for its own negligence, principally relies upon the opinion of the Washington State Supreme Court in *Griffiths v. Broderick, Inc.*, *supra*. The provision considered in *Griffiths v. Broderick, Inc.* expressly exonerated the indemnitee from "all loss, damage or injury to any person or persons whomsoever, or property, *arising from any cause or for any reason whatsoever* in or about said premises * * *." The Washington Court held that this language sufficiently conveyed the intention of the parties to relieve the indemnitor of liability for its own negligence. The provision advanced by appellee omits the phrase "arising from any cause or for any reason whatsoever." Appellants submit that this difference in the *Broderick* provision and the appellee's form is substantial in that the phrase omitted from the present agreement makes it impossible of being fairly interpreted as relieving appellee from the effects of its own negligence.

However, accepting the appellee's contention that the proffered provision of its Membership Application form is sufficient to exonerate it from the effects of its own negligence, and appellants certainly do not concede that point, it is abundantly clear that the "damage and/or loss" suffered by appellants did not occur on the premises of the Yacht Club.

The appellee cannot deny that the damage to the appellants' cabin cruisers, and the loss of their boat-house occurred on the open waters of Puget Sound several miles from the basin in which the appellee Yacht Club is situated.

While the appellee alludes to a "fundamental principle of law" that the place of the wrong is the situs of a tort action, we cannot perceive its relevancy to the provision in question which extends only to "damage" which occurs "on the premises." The damage in this instance plainly did not occur on the appellee's premises (without regard to where the situs of a tort action might be located). Furthermore, appellee misconstrues the rule of law as to the situs of a maritime tort resulting in loss or damage on navigable waters. Where a tort originates at waterside or on land but the ultimate injury occurs on navigable waters, the situs of the tort is not at the place of the original wrongful act, but is on those navigable waters, at the place where the damage occurs. *The America*, 34 F. Sup. 855 (ED NY, 1940). To the same effect see *Smith v. Lampe*, 64 F.2d 201 (6 Cir., 1933) and *The S.S. Samovar*, 72 F. Sup. 574, 1947 A.M.C. 1046 (N.D. Cal., 1947).

Even more fundamentally in making its argument, the appellee ignores a most pertinent rule of law recently announced by the Washington State Supreme Court in *Feigenbaum v. Brink*, *supra*, (1965). Although appellants have quoted this passage earlier we have taken the liberty of repeating it in this context:

"In the absence of unequivocal language, the non-liability provision of a contract will not be extended to include areas not specifically described. * * *"

Appellee's Liability as a Bailee

Because the appellee again suggests that its relation-

ship to the appellants, that of a non-profit incorporated private club to two of its members, is somehow inconsistent with its being charged with the duties of a bailee for hire under the facts of this cause, the appellants would once again note the reasoning of the Supreme Court of the State of Louisiana in *Lewallen v. Board of Levee Commissioners of Orleans L. Dist.*, 166 So.2d (La. App., 1964) and of the Washington State Supreme Court in *Spare v. Belroy Housing Corp.*, 179 Wash. 385, 38 P.2d 207 (1937). Both of these cases, which we have cited earlier, indicate that one who would ordinarily stand as a lessor or renter of space in which another intends to keep his property, will become the bailee of that property when he undertakes to move it to a different location of his own choosing. The lessor of space in this manner cloaks himself with the duties of a bailee for hire. We also submit that it is clear that an incorporated non-profit private club taking possession of a member's property without specific charge therefor, but charging dues to the member for its services in general, becomes the bailee for hire of that member's property. *Greer v. Los Angeles Athletic Club*, 258 Pac. 155, 84 Cal. App. 272 (Cal. App., 1927).

At page 17 of its brief, appellee quotes language from its Moorage Application in which the Yacht Club is exempted from any liability for damage to member's property should it be damaged while being moved in case of "emergency or disaster." There is no evidence of any emergency or disaster threatening appellants' property, nor was such a contention even advanced by

the appellee in the Pre-Trial Order which delineated the issues to be heard by the District Court. This provision by its own terms is inapplicable to the incident in question and irrelevant to this appeal. Appellants can only conclude that by raising it the appellee is merely attempting to obfuscate the issues.

Appellee's only further argument to the appellants' assignments of error related to the theories of bailment and conversion, is that the court was in error in failing to find the appellants contributorily negligent. Principally the appellee contends that its publication *Lubberline* (the pertinent copy appears as Exhibit C) was notice to appellants that their boathouse and cruisers would be moved. It is clear that the notation in that issue of the Club bulletin was the only effort made to notify appellants of the movement (Tr. 16, 17). The inadequacy of that notice is patent; it merely indicates that "about 15 pilings" would be replaced "from the George Thompson Boathouse Northwest (toward the entrance to the basin)"; and that it "probably" would "be necessary to move many of the boathouses affected by this project." Clearly the notice did not state which boathouses would be moved, when they might be moved, for what duration, nor where they would be temporarily located. The District Court's conclusion that there was no actual or implied notice to the appellants of the movement of their boathouse is amply supported by the record.

While the appellee correctly states that appellant Woodworth did observe the manner in which the boat-

house was moored following its movement by the appellee's employees, it incorrectly infers that this fact rendered him contributorily negligent. The District Court in its oral opinion stated in this regard:

"In my judgment, Woodworth at that time, a new-to-boating landlubber and not particularly acquainted with the vagaries of weather, wind, and sea as relating to boating and boat mooring, in an offhand way inquired of Mojean if he thought the tie-up was adequate, and Mojean saying that he thought it was, in no way whatever would preclude Woodworth from relying on the assumption that the respondent's employees, long-experienced in mooring vessels in this very area, had not done it properly and securely despite the doubt arising from this casual glance of the tie-up."

The validity of this conclusion of the District Court is imperative upon the evidence (Tr. 45, 46, 65).

The further suggestion of the appellee that notice to appellant Woodworth of the manner in which the boathouse was moored constituted an implied notice to appellant Elliott under a concept of the law of partnership, is wholly specious. As authority for that principle, the appellee cites two sections from the partnership statute of this state indicating that knowledge to one partner will be imputed to another. However, these statutory provisions expressly apply only to commercial partnerships and have utterly no application to the relationship between the appellants, which is that of co-owners of a boathouse in which each keeps his own yacht. This limitation of the statutory provisions regarding partnerships cited by the appellee is clearly indicated

by reference to the portion of the statute introducing the sections appellee cites:

“Nature of a partnership, RCW 25.04.060. Partnership defined: (1) A partnership is an association of two or more persons *to carry on as co-owners a business for profit.*”

The appellants submit that the appellee is clearly liable both under theories of bailment and of conversion, and that no matter which of these views is taken, the appellee cannot escape liability through the proffered exculpatory language of its membership application form. Furthermore the appellants submit that the appellee's assertion that the appellants had adequate notice that their boathouse would be moved to an alternate location by the appellee's employees, and that the appellants were contributorily negligent in not seeing that the boathouse was moored in a more adequate fashion than was accomplished by the appellee, is without support on the record, and that the District Court's findings in these regards is without error.

CONCLUSION

Without indulging in a lengthy restatement of the points already reviewed by appellants' initial brief, it again is submitted:

(a) That the exculpatory language of the appellants' Moorage Application and Membership Application is insufficient to permit it to escape the effects of its own negligence;

(b) That even if it were a sufficient disclaimer of

negligence under proper construction, it expressly does not apply to the facts of the instant loss, and

(c) That as a matter of law, these exculpatory provisions under concepts of bailment or of conversion, should not be applied to bar appellants' recovery.

Respectfully submitted,

LANE, POWELL, MOSS & MILLER

RICHARD F. ALLEN

Proctors for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

RICHARD F. ALLEN

of Proctors for Appellants

No. 20,358
United States Court of Appeals
For the Ninth Circuit

FLYING TIGER LINES, INCORPORATED,
and
EMPLOYERS MUTUAL LIABILITY INSUR-
ANCE COMPANY OF WISCONSIN,
Appellants,
vs.

DAVID R. LANDY, Deputy Commissioner
for the 13th Compensation District,
and

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,
Appellees.

FEB 10 1967

APPELLANTS' OPENING BRIEF

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**United States Court of Appeals
For the Ninth Circuit**

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and
EMPLOYERS MUTUAL LIABILITY INSUR-
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Appellants,

vs.

DAVID R. LANDY, Deputy Commissioner
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PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,

Appellees.

APPELLANTS' OPENING BRIEF

STATEMENT IN RESPECT TO JURISDICTION

This appeal grows out of the filing of an application for benefits under the Defense Bases Act, United States Code, Title 42, sections 1651-54. The application was filed on behalf of the appellees, Peter Gregory Thomas, Maureen Altair Thomas and Terry Ava Thomas, minor children of Gregory Peter Thomas,

deceased, with the Bureau of Employees' Compensation, United States Department of Labor, on the ground that said appellees, as dependents of the decedent Gregory Peter Thomas, were entitled to the death benefits provided by the Longshoremen's and Harbor Workers' Compensation Act on account of his death.

Subsection (b) of section 1653 of United States Code, Title 42, provides as follows in respect to jurisdiction:

(b) Judicial proceedings provided under sections 18 and 21 (33 U. S. Code 918 and 921) of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act (42 U. S. Code 1651-1654) shall be instituted in the United States District Court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

The order involved in this case was issued by the Deputy Commissioner of the 13th Compensation District, with headquarters in San Francisco; and therefore jurisdiction to review the orders issued by such deputy commissioner resides in the United States District Court for the Northern District of California, Southern Division.

Jurisdiction of this Court upon appeal is invoked under section 128(a) of the United States Judicial Code (28 U. S. Code 225).

STATEMENT OF THE CASE

The application for benefits made on behalf of the appellees Thomas to the Deputy Commissioner of the 13th Compensation District was made after these same appellees had already applied to the Industrial Accident Commission of the State of California for the granting of a death benefit on account of the demise of their father under the workmen's compensation laws of California. A hearing had been held before a referee of the California Industrial Accident Commission, the matter was submitted for decision, and the Commission then made its award of death benefits to said appellees.

The litigation before the California Commission involved, as defendants, the same parties as in this matter, to wit, the Flying Tiger Lines, Inc. and its workmen's compensation insurer, the Employers Mutual Liability Insurance Company of Wisconsin; and the latter company was ordered to pay, and did pay, the benefits awarded to appellees by the California Commission.

After all of the foregoing had occurred, there was filed on behalf of the same appellees an application for death benefits on account of their father with the Bureau of Employees' Compensation. A hearing on said application was scheduled by that agency and was held in July, 1964 at Los Angeles, California, before David R. Landy, a deputy commissioner of said Bureau of Employees' Compensation, one of the appellees herein. Thereafter, an award of a death

benefit in favor of the appellees Thomas was made by the deputy commissioner.

Within 30 days thereafter, as required by U. S. Code, Title 33, section 921(a), the appellants herein filed their complaint for injunction in the District Court of the United States, Northern District of California, Southern Division. The District Court, acting through District Judge Albert C. Wollenberg, issued an order on May 24, 1965, granting summary judgment in favor of the appellees.

STATEMENT OF FACTS INVOLVED

The decedent Gregory Peter Thomas was employed as an airline pilot by the Flying Tiger Lines, Inc., an appellant herein. The latter, at all times pertinent hereto, was insured as to liability for workmen's compensation benefits by the Employers Mutual Liability Insurance Company of Wisconsin, also an appellant herein.

In the early part of March, 1962, military authorities of the United States were desirous of having certain military personnel transported from Travis Air Base, in California, to the Tan Son Nhut Air Base, near Saigon, South Vietnam. A contract was entered into between the United States Military Air Transport Service (MATS) and Flying Tiger Lines, Inc. to cover the transportation of the personnel (96 persons) in question, and Flying Tiger Lines, Inc. accordingly supplied a plane and crew of 11 to carry

out the provisions of the contract. One of the crew was Gregory Peter Thomas, a pilot who had been hired in, and resided in, California.

The plane was a Constellation Aircraft, number 69213. It flew from Travis Air Base to the Island of Guam, and on the evening of March 15, 1962 left Agana, Guam, headed for Clark Air Base, Manila, Philippine Islands. The plane disappeared while en route to the latter point. An intensive sea and air search failed to turn up any evidence of the plane, debris or survivors; and military authorities concluded that the plane had crashed into the ocean, resulting in the death of all 107 persons aboard.

A petition for determination of death of the decedent, Gregory Peter Thomas, was filed in the Superior Court of Los Angeles County, pursuant to which the Court, on September 28, 1962, issued its order establishing the fact of death (Exhibit H at the hearing before the deputy commissioner). Subsequently there was issued an official "Court Order Delayed Certificate of Death".

Thereafter, the widow and children of decedent Gregory Peter Thomas filed a claim for death benefit with the Industrial Accident Commission of California. A hearing was held before Referee Leon M. Berger who, on March 18, 1963, filed his "Order Dismissing Party Applicant and Findings and Award". This Award granted the appellees Thomas a death benefit of \$17,500.00, payable to their guardian ad litem and trustee at the rate of \$70 weekly. The decision read as follows:

“Application having been filed herein, all parties having appeared and the matter having been regularly submitted, the Honorable Leon M. Berger, Referee, finds, awards and orders as follows:

Findings of Fact

“1. Gregory Peter Thomas, died on March 16, 1962 as a proximate result of injury on the same day arising out of and occurring in the course of his employment by The Flying Tiger Line, Inc., whose insurance carrier was Employers Mutual Liability Insurance Company of Wisconsin.

“2. Employee left surviving him, wholly dependent, Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, wholly dependent minor children.

“3. No burial expense was incurred by the applicants.

“4. Doreen M. Thomas is neither a necessary nor proper party applicant herein.

“5. The reasonable value of the services of applicant's attorney is \$750.00.

Award

“Award Is Made in favor of Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, minors against Employers Mutual Liability Insurance Company of Wisconsin, of \$17,500, payable as follows:

“To Doreen M. Thomas as Guardian ad Litem and Trustee for Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, minors, \$3,710.00 payable forthwith and \$70.00 weekly thereafter beginning March 24, 1963, until paid,

together with interest provided by law; less \$750.00 payable to J. Wallace McKnight, whose lien is hereby allowed."

After weekly payments aggregating \$4,270.00 had been made by the plaintiff-carrier herein, and pursuant to a request for lump sum payment, the Industrial Accident Commission issued an order commuting the unpaid balance of \$13,230.00 to its then present value of \$12,549.91, payable to the guardian ad litem and trustee of the three minor children of the decedent, who are named as defendants in this proceeding. Payment was then made in accordance with this order by the plaintiff-carrier, with the result that total payments under the Commission award and order amounted to \$16,819.91.

In April, 1963, officials of the Bureau of Employees' Compensation, having learned of the casualties occurring on March 16, 1962, made a demand upon the plaintiff-carrier herein for the filing of reports covering the deaths of members of the crew of the missing plane, on pain of the imposition of a penalty for failure to do so, under section 30(e) of the Longshoremen's and Harbor Workers' Compensation Act. The requested reports were filed under protest.

The foregoing action led to the filing, on July 29, 1963, of a claim on behalf of the three defendant minors before the deputy commissioner of the 13th Compensation District, on the theory that said deputy had jurisdiction of the claim under provisions of the Defense Bases Acts (42 U.S.C.A. 1651-1654).

The matter was set for hearing at Los Angeles, California, on July 7, 1964, and was heard by Deputy Commissioner Landy. Issues raised included (1) Fact of death, (2) Dependency of the minor children, (3) Election of remedies, and (4) Jurisdiction on the ground that the Defense Bases Acts do not apply. Counsel for the plaintiff-carrier herein asked for credit in the full sum of \$17,500.00, on the ground that this was the amount awarded under the State law, which award had been satisfied by the commutation to a present value of \$16,819.91.

At the time of hearing, there was placed in the record a copy of Contract No. AF 11(626)-389 between the Military Air Transport Service and the Flying Tiger Lines, Inc., a document of 146 pages covering the general agreement for the rendition of transportation of personnel by Flying Tiger Lines, Inc., with provision for individual service orders to be issued covering each separate flight to be made (see Exhibit J).

Marked as Exhibit K was a copy of the "service order" covering the flight in question. It was dated March 2, 1962, and was numbered "29." It called for the transporting of 99 Pax (Passengers?) at a unit price of \$334.698, total amount of \$33,135.10, from Travis Air Force Base in California to Tan Son Nhut Air Base, Saigon, Vietnam, via Clark Air Base, Manila, about March 13 or 14, 1962. It bore a notation that "The transportation ordered herein is necessary to fulfill unforeseen military requirements as to which time is of the essence."

Following the hearing on July 7, 1964, before deputy commissioner Landy, the latter issued, under date of August 7, 1964, his Compensation Order and Award of Death Benefits. Its "Findings of Fact" included the following:

"1. That on the 15th day of March, 1962, the deceased employee above named was in the employ of the employer above named as an Airline Pilot on a Public Works Contract number A.F. 11 (626)-389 to transport Army personnel outside the Continental United States to the Pacific Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by the Acts of Congress of August 16, 1941 and December 2, 1942 (42 U.S.C.A. 1651-1654) and that the liability of the employer for compensation under said Acts was insured by the Employers Mutual Liability Insurance Company of Wisconsin."

The Award granted the minor children benefits at the rate of \$68.25 a week, accrued from March 16, 1962 through July 7, 1964 in the amount of \$8,238.75, together with \$68.25 a week payable on a continuing basis, "subject to the limitations of the Act in respect to age and continuing dependency." The Award contains the following provision:

"The carrier having paid the sum of \$16,819.91, which amount is \$8,581.16 in excess of the death benefits accrued to July 7, 1964 inclusive, shall be given credit for such payment as it may extend into the future. . . ."

Under the terms of this Award, no further benefits will be payable to the minor dependents until some time in the year 1966.

It is the position of the plaintiffs herein that the Compensation Order and Award of Death Benefits is not in accordance with law and should be vacated and set aside by this Honorable Court.

QUESTIONS PRESENTED

(1) Did the defendant deputy commissioner have jurisdiction under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as extended by those of the Defense Base Act, to make an award of benefits to the minor children named as defendants herein?

(2) Was the prior decision of the State Industrial Accident Commission on the same issues *res judicata*?

(3) In any event, was the carrier entitled to full credit, against any award of federal benefits, for the amount of the prior state commission award, when the latter had been paid in full?

ARGUMENT**I.**

THE PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS EXTENDED BY THE DEFENSE BASE ACT, DO NOT CONFER JURISDICTION OVER THIS CASE UPON THE FEDERAL DEPUTY COMMISSIONER.

(1) There is no jurisdiction under provisions of the Longshoremen's Act itself.

Coverage under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901-950) is strictly limited by its own provisions. Benefits are payable only for the results of an injury occurring on the navigable waters of the United States, *and* if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. Moreover, the Act excludes coverage for injuries to a member of the crew of any vessel. 33 U.S.C.A. 903.

The employee's death in the present case fails to meet any of these statutory requirements. It did not result from an injury occurring on navigable waters of the United States, but rather in waters lying between Guam and the Philippine Islands. Moreover, the situation was one in which benefits could be validly provided under State law; indeed, the claim was fully adjudicated under the compensation law of the State of California, an award of benefits was made by the Industrial Accident Commission of California, and full payment under the award was made by the employer's insurer, one of the plaintiffs herein. And fi-

nally, the decedent, being a vessel crew member, was not within the coverage of the Act.

It will be conceded, we are sure, that so far as the provisions of the Longshoremen's Act itself are concerned, there is no jurisdiction over this matter. Clearly, the deputy commissioner's power to act must be found, if at all, in the provisions of the Defense Base Act (42 U.S.C.A. 1651-1654).

(2) There is no jurisdiction under provisions of the Defense Base Act.

- (a) It is debatable whether the employer's contract with the government was a "public work" contract within the meaning of the Defense Base Act.

Jurisdiction of the deputy commissioner under provisions of the Defense Base Act is dependent upon injury or death occurring during employment under a contract performed for the purpose of engaging in "public work" as defined by 42 U.S.C.A. 1651 (b) (1). As defined by that subsection of the Act, "'public work' means any . . . project . . . involving construction, alteration, removal or repair for the public use of the United States or its allies . . ." Full text of this subdivision will be found on page 5 of the "Memorandum On Behalf Of Defendant Deputy Commissioner" at lines 25-30.

Rather clearly, the employer's contract in the present case is *not* one "involving construction, alteration, removal or repair." The language of the section goes on to mention certain other projects and operations; but it is a standard rule of construction that where general words follow the enumeration of particular

classes of things, the general words will be construed as applicable only to things of the same general nature or class as those enumerated. *Pasadena University v. Los Angeles County*, 190 Cal. 786; *In re Cook*, 67 C.A. 2d 20. This is the rule of *ejusdem generis*, which is founded on the idea that if the general words were intended to prevail in their full and unrestricted sense, there would be no need for the special enumeration of the particular classes. *In re Johnson*, 167 Cal. 142.

Applying here the rule of *ejusdem generis*, to the definition of "public work" found in subsection 1651 (b)(1), the employer's contract must involve "construction, alteration, removal or repair." There is no evidence in this case that the contract involved any of such elements; therefore, the deputy commissioner's decision is erroneous as a matter of law.

It has been held that an airplane pilot employed by an airline company was not engaged in "public work" within the meaning of the Defense Base Act, so as to limit his remedy to that provided thereunder, because of a contract between his employer and the United States for air transport services and his employment in performance of such services. *Walker v. American Overseas Airline, Inc.*, 90 N.Y.S. 2d 537, 275 App. Div. 974. See, also, *Berman v. Hudson American Co.*, 65 N.Y.S. 2d 676, 271 App. Div. 847, appeal denied 296 N.Y. 1055, 71 N.E. 2d 777.

(b) The provisions of the Defense Base Act are made expressly inapplicable in respect to the injury or death of a "member of the crew of any vessel." 42 U.S.C.A. 1654 (3).

Statutory use of the all-inclusive modifier "any" indicates that the word "vessel" is not to be given a restricted significance, but is rather to be understood in its broadest sense. Thus, its meaning must be taken to include those vessels which navigate in the air as well as the water. Standard dictionaries define the term "vessel" as including aircraft. See, for example, Webster's Unabridged, 1961 edition, at page 2547, or the latest edition of the American College Dictionary.

It will be conceded that the deceased employee was a member of the crew of the ill-fated craft which disappeared on March 16, 1962; and it is obvious that the language of the statute is sufficiently explicit, since it refers to *any* vessel, to require the exclusion of a crew member, whether his vessel be a ship of the sea or of the air.

We are aware of the statutes providing that the navigation and shipping laws of the United States, including any definition of "vessel" found therein, shall not be construed to apply to seaplanes or other aircraft. 46 U.S.C.A. 183; 49 U.S.C.A. 177, 401 et seq. We are, also, aware of the cases decided under these statutes and holding planes not to be "vessels" within their provisions. *Noakes v. Imperial Airways, Ltd.*, 29 F. Supp. 412; *Dollins v. Pan American Grace Airways*, 27 F. Supp. 487, 489.

Significance of the foregoing cases has been wiped out by the repeal of the statutes in question by 72

Stat. 806, effective August 23, 1958. This leaves untouched, however, court rulings which have held a plane to be a "vessel," for certain purposes, at least. *Gdynia-American Shipping Lines v. Lambros Seaplane Base, Inc.*, 115 F. Supp. 796; *Reinhardt v. Newport Flying Service Corp.*, 133 N.E. 371, 18 A.L.R. 1324.

We are aware also of section 3 of U.S.C.A. Title 1, which reads: The word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water. Despite the fact that this is based on the Act of July 18, 1866, 14 Stat. 178, we have been unable to find any case which holds that the term "vessel," by reason of this section, does not include aircraft.

The Death On The High Seas Act (46 U.S.C.A. 761) provides a cause of action for wrongful death against the responsible "vessel, person or corporation." The courts have had no difficulty in construing "vessel" to mean an airplane. *Sierra v. Pan-American World Airways, Inc.*, 107 F. Supp. 519; *Lacey v. Wiggins Airways, Inc.*, 95 F. Supp. 916; *Wyman v. Pan-American World Airways, Inc.*, 43 N.Y.S. 2d 420.

Even before the repeal of the Air Commerce Act (46 U.S.C.A. 183; 49 U.S.C.A. 177, 401 et seq.) the federal courts laid down the rule that statutes containing a restricted definition of the term "vessel" must be interpreted in the light of their special purposes. For example, Judge Goodman had the following to say:

“Plaintiff further urges that, even if the Death On The High Seas Act, in its inception, afforded a right of action for deaths resulting from airplane crashes on the high seas, such deaths have been removed from its ambit by the Air Commerce Act of 1926. . . . Section 7 of that Act provides that the navigation and shipping laws of the United States, including any definition of ‘vessel’ or ‘vehicle’ found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft. The purpose of the Air Commerce Act of 1926 was to foster civil aviation by establishing federal aids to navigation and federal safety regulations. . . . Section 7 was intended to prevent any conflict between the existing federal regulations respecting the navigation of vessels and those to be promulgated respecting the navigation of aircraft. The term ‘navigation and shipping laws’ as used in Section 7 of the Act obviously refers to those federal laws specifically governing the navigation and operation of the merchant marine. The term was never intended to include a general admiralty statute such as the Death On The High Seas Act.” *Wilson v. Transocean Airlines*, D.C. Cal. 1954, 121 F. Supp. 85, at page 93.

Inasmuch as dictionary synonyms for “any” include “every” and “whatever or whichever it may be” (see American College dictionary), it follows that “any vessel” (as we find it in 42 U.S.C.A. 1651 (3)), can properly be taken to mean “every vessel, whatever it may be.” Taken in conjunction with the various court

decisions which treat an airplane as a vessel (and in the fact that contrary decisions were based on statutes repealed in 1958), an employee who is a member of the crew of a transoceanic transport plane must validly be regarded as a member of the crew of a vessel. As such, he is *not* within the coverage of the Defense Base Act, and the deputy commissioner was without jurisdiction to make the decision which he issued in this case.

II.

REGARDLESS OF WHETHER A VALID AWARD UNDER THE DEFENSE BASE ACT COULD BE MADE UNDER ORDINARY CIRCUMSTANCES, NEVERTHELESS A PRIOR DECISION ON THE SAME ISSUE BY A STATE TRIBUNAL IS RES JUDICATA.

As to a litigated matter within the jurisdiction of an industrial accident board, a final award if not appealed from has the same conclusiveness and binding effect as the final judgment of a court. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149; *Ocean Accident & Guarantee Corp. v. Pruitt*, 58 S.W. 2d 41; *General American Casualty Co. v. Rosas*, 275 S.W. 2d 570; *Traders & Gen. Ins. Co. v. Baker*, 11 S.W. 2d 837.

The case of *Mike Hooks, Inc. v. Pena*, 313 F. 2d 696, states at page 700:

“... With recognition that a State cannot impose state workmen’s compensation on an injured interstate railroad worker, the Supreme Court nevertheless implied the doctrine of *res judicata*

to foreclose a subsequent Federal Employers' Liability Act suit where the state compensation tribunal in an adversary proceeding determined that the employee was engaged in intrastate employment. *Chicago, R. I. & P. Ry. v. Schendel*, 270 U.S. 611, 616, 46 Sup.Ct. 420, 70 L. Ed. 757."

The "Memorandum On Behalf Of Defendant Deputy Commissioner" states, at lines 14-21 of page 12, the following:

"To date, no court has held that a claimant's pursuit of a State compensation remedy precludes, as an election, his entitlement to receive the larger Federal compensation. As pointed out in *Mike Hooks, Inc. v. Pena*, 313 F. 2d 696, 700, n. 21 (C.A. 5, 1963), even with respect to subjects that might conceivably lie within the jurisdiction of a State tribunal in this area, 'the most that the earlier [State] decision does is to require proper credit', that is, credit in the Federal proceedings for what the earlier adjudication has granted."

The Memorandum then proceeds to list the six citations which follow the above quotation in the *Hooks* opinion, *supra*, and to quote excerpts from two of the opinions which in turn cited two additional cases supposedly supporting the foregoing statements.

The fact is that even the *Hooks* case itself does not provide support for the contentions of the defendant. Rather, it indicates, albeit by way of dictum, that the court regarded the prior decision by the state workmen's compensation tribunal as *res judicata* be-

tween the employee and the carrier; but as between the employee and employer, the former was not foreclosed from filing a Jones Act suit against the latter, since the employer was not a real party in the proceeding before the Texas Industrial Accident Board.

The material cited from footnote 21 on page 700 of the *Hooks* opinion, *supra*, leaves the impression that the holding of the court in that case was to the effect that "the most that the earlier (State) decision does is to require proper credit" in the federal proceedings for what the earlier adjudication had granted. What the footnote actually says (after citing a total of six cases) is that "On them a substantial argument *may* be marshalled that in this area the most that the earlier decision does is to require proper credit." (Emphasis added.) The various cases thus cited lend dubious support to defendant's position that nothing in the way of an earlier decision can preclude subsequent action by a deputy commissioner. Let us review them to determine their precise significance:

In two of the cases cited, there had been neither payment nor decision under the state law: *Flowers v. Travelers Ins. Co.*, 258 F. 2d 220; *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114.

In three of the cases, there had been voluntary payments under the state law, but no claim filed or award made: *Lawson v. Standard Dredging Co.*, 134 F. 2d 771; *Massachusetts Bonding Ins. Co. v. Lawson*, 149 F. 2d 853; *Kibadeux v. Standard Dredging Co.*, 81 F. 2d 670.

In the remaining three cases, either an agreement between the parties had been rubberstamped by state commission action, *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968; *Gahagan Const. Co. v. Armao*, 165 F. 2d 301; or the claim which had been filed, though tentatively allowed, was still under investigation, *Western Boat Building Co. v. O'Leary*, 198 F. 2d 409.

None of the foregoing rise to the dignity of a precedent in reference to the present case, in which a formal hearing was held before the state tribunal, issues were raised and adjudicated, an award of benefits was made to the claimants, and such award was paid in full before the filing of a claim with the federal deputy commissioner.

It is true that the Longshoremen's and Harbor Workers' Compensation Act provides (33 U.S.C.A. 915(b)) that "no agreement by an employee to waive his right to compensation under this Act shall be valid." However, in the present case there was neither an agreement or a waiver, so far as we are aware, either by the employee or anyone else. We, therefore, see no relevance of this section of the Act to a situation where the claimants have elected to seek a state, rather than a federal, remedy.

It is also true that the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 916) provides that no assignment or release of benefits under that Act shall be valid. But we fail to see its applicability to the facts of the present case. Here, there

has been no assignment of benefits, express or implied. Nor has there been a release of benefits, except by a tortured interpretation of the word "release". The claimants simply, and very properly, elected to avail themselves of state benefits, undoubtedly convinced that they were in the proper forum until prevailed upon, directly or indirectly, by federal authorities to bring their claim to that tribunal.

III.

ASSUMING, WITHOUT CONCEDED, THAT OUR PRIOR CONTENTIONS ARE NOT VALID, WE SUBMIT THAT THE CARRIER IS ENTITLED TO FULL CREDIT FOR THE AMOUNT OF THE STATE COMMISSION AWARD, WHEN SUCH AWARD HAS BEEN PAID IN FULL BY THE CARRIER.

As indicated in our "Complaint For Injunction" (see page 5, lines 7-11), "Counsel for the plaintiffs asked for credit in the full amount of \$17,500.00, on the ground that this was the amount awarded under the state law, which amount had been satisfied by commutation to a present value of \$16,819.91." Nevertheless, by the award herein of the deputy commissioner, credit was given to the plaintiff carrier only for the lesser amount.

Precedent requires that the carrier be granted credit by the deputy commissioner for payment under the state award. *Lawson v. Standard Dredging Co.*, 134 F. 2d 771. However, the "Memorandum On Behalf Of Defendant Deputy Commissioner" (at page 13 thereof) contends that "credit is given for actual

payment . . . not for the mere award which might never in fact be paid." This is a contention which might be raised in regard to an unpaid award; but the record in the present case shows that the award of the state commission has been paid in full. The face amount of that award was \$17,500.00 and it was satisfied, not only in full, but expressly in conformity with the orders issued by the commission itself.

Cited by the "Memorandum On Behalf Of The Defendant Deputy Commissioner" as further support for his failure to allow full credit is the case of *Globe Indemnity Co. v. Calbeck*, 230 F. 2d 14 (see page 13 of the Memorandum). An examination of the facts of that case makes it plain that credit had been requested only for the net amount of payments by the carrier. The court's opinion says, at page 17, "nor did they request such credit at page 77 of the transcript." In the present case, counsel for the plaintiffs expressly requested credit for the full \$17,500.00 which had been satisfied by the carrier through payment in conformity with commission orders.

RECAPITULATION

We respectfully contend that the decision of the deputy commissioner is not in accordance with law for the following reasons:

- (1) It is in excess of his jurisdiction under either the Longshoremen's Act or the Defense Base Act;
- (2) The prior decision of the state commission is *res judicata*; and

(3) Even if the foregoing contentions are not upheld, the carrier should have been granted full credit for the amount of the state award, the latter having been satisfied in full.

Wherefore we urge that the motion for summary judgment and for a dismissal of our complaint be denied, and that the order and award of the deputy commissioner be vacated, annulled and set aside.

Dated, September 13, 1965.

HANNA & BROPHY,

Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WARREN L. HANNA,

Attorney for Appellants.

(Exhibits Follow)

Exhibits.

Exhibit A

Clerk's Office
 United States District Court
 for the
 Northern District of California
 Southern Division

Civil Action No. 42747

FLYING TIGER LINES, INCORPORATED, and EMPLOYERS MUTUAL LIABILITY INSUR- ANCE COMPANY OF WISCONSIN, vs. DAVID R. LANDY, Deputy Commissioner for the 13th Compensation District, and PETER GREGORY THOMAS, MAUREEN ALTAIR THOMAS, and TERRY AVA THOMAS, Minor Children of Gregory Peter Thomas, Deceased, Defendants.	}
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There was entered on the docket May 24, 1965
 (judgment) (Summary) in favor of the defendant.

Received May 25, 1965

Hanna & Brophy

James P. Welsh, Clerk.

Exhibit B

In the United States District Court
for the Northern District of California,
Southern Division

Civil No. 42747

FLYING TIGER LINES, INCORPORATED,
and
EMPLOYERS MUTUAL LIABILITY INSUR-
ANCE COMPANY OF WISCONSIN,
Plaintiffs,

vs.

DAVID R. LANDY, Deputy Commissioner
for the 13th Compensation District,
and

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,
Defendants.

JUDGMENT

This action came on for hearing on a Motion for Summary Judgment before the Court, Honorable Albert C. Wollenberg, District Judge, presiding, and the issues having been presented and a decision having been duly rendered,

It Is Ordered And Adjudged that the compensation order of the Deputy Commissioner be and the same hereby is affirmed and that the action be dismissed on the merits.

Dated at San Francisco, California, May 17, 1965.

/s/ Albert C. Wollenberg

United States District Judge

Cecil F. Poole, United States Attorney

John F. Meadows, Attorney in Charge,

West Coast Office, Admiralty & Shipping Section

Alexander Karst, Attorney, Admiralty

& Shipping Section, Dept. of Justice

By /s/ Alexander Karst

Alexander Karst

Attorneys for Defendant David R.
Landy.

Approved As To Form:

Hanna & Brophy

By /s/ Warren L. Hanna

Warren L. Hanna

Attorneys for Plaintiffs.

Exhibit C

In the United States District Court
for the Northern District of California,
Southern Division

Civil No. 42747

<p>FLYING TIGER LINES, INCORPORATED, and EMPLOYERS MUTUAL LIABILITY INSUR- ANCE COMPANY OF WISCONSIN,</p>	Plaintiffs,
vs.	
<p>DAVID R. LANDY, Deputy Commissioner for the 13th Compensation District, and PETER GREGORY THOMAS, MAUREEN ALTAIR THOMAS, and TERRY AVA THOMAS, Minor Children of Gregory Peter Thomas, Deceased,</p>	Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This is an action to enjoin and set aside an award of death benefits to the defendant children of Gregory Peter Thomas, deceased, by the defendant Deputy Commissioner. Defendant Deputy Commissioner moves for summary judgment on the ground that there is

no issue as to the material facts and as a matter of law he is entitled to judgment.

Plaintiffs argue: (1) the Deputy Commissioner lacked statutory jurisdiction to make the award; (2) the award was barred because of *res judicata*; and (3) the amount of the award was computed incorrectly.

I

The award was made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, as made applicable to employment at certain defense base areas and elsewhere by the Defense Base Act of August 16, 1941, as amended, 55 Stat. 622, 42 U.S.C. 1651-1654. The decedent was a pilot for plaintiff Flying Tiger Lines. While in the course of his employment the plane on which he was flying disappeared with all aboard somewhere between Guam and the Philippine Islands. The plane was transporting military personnel from Travis Air Force Base, California, to Tan Son Nhut Air Base, Saigon, Viet Nam, pursuant to a contract between Flying Tiger Lines and the government.

Plaintiffs argue that the Deputy Commissioner was without jurisdiction to make the award because the agreement between Flying Tiger Lines and the government was not a "public work" contract within the meaning of the Defense Base Act and even if it was since the decedent was a member of the crew of a "vessel" his death was specifically excluded from the provisions of that Act.

First, was the agreement a "public work" contract within the meaning of 42 U.S.C. 1651 (b) (1)? Yes.

Prior to 1958 "public work" meant "any fixed improvement or any project involving construction, alteration, removal, or repair for public use . . . including but not limited to projects in connection with the war effort. . . ." 56 Stat. 1035 (1942). On the basis of this wording the federal courts held that service projects not directly concerning "construction, alteration, removal, or repair" were within the definition. *Republic Aviation Corporation v. Lowe*, 69 F.Supp. 472 (N.Y. 1946), affirmed 164 F.2d 18 (C.A. 2, 1947). To clarify the meaning of "public work" in 1958 the definition was reworded to incorporate the interpretation of the courts. S.B. No. 1886, 85th Congress, 2nd Session. The definition now includes "any project, whether or not fixed . . . including . . . operations under service contracts and projects in connection with the national defense. . . ." 42 U.S.C. 1651 (b) (1).

The conclusion is therefore inescapable that Congress intended service contracts which did not directly provide for "construction, alteration, removal or repair" to be included within the definition of "public work." Plaintiffs' argument based on *ejusdem generis* is without merit. In this instance there is specific legislative history to guide interpretation and there is no need to resort to general rules of construction.

Second, was the decedent's death specifically excluded from the provisions of the Defense Base Act?
No.

The Defense Base Act excludes from its coverage "a master or member of a crew of any vessel." 42 U.S.C. 1654. The same provision appears in the Harbor Workers Act, 33 U.S.C. 903. The Defense Base Act gives persons who are subject to it the remedies of the Harbor Workers Act and it is a fair inference that the class intended to be excluded in both was the same. The purpose of the exclusion in the Harbor Workers Act was to retain for seamen the protection of the Jones Act. *Warner v. Goltra*, 293 U.S. 55, 159-60 (1934). Since protection under the Harbor Workers Act was exclusive, 33 U.S.C. 905, it was necessary to exclude those protected by the Jones Act in order to achieve this objective. *South Chicago Co. v. Bassett*, 309 U.S. 251, 256 (1939).

However, a pilot of an airplane is clearly not protected by the Jones Act. Consequently, there is absolutely no support in the legislative history for including "airplane" within the definition of "vessel" in 42 U.S.C. 1654.

II

Prior to filing of the federal claim a death benefit award was made to decedents minor children by the Industrial Accident Commission of California. Plaintiffs now argue that the Commission award was res judicata because a final award of an industrial accident board has the same effect as the final judgment

of a court. Undoubtedly the issue under state law between the parties was *res judicata*. However, plaintiffs have cited no authority for the proposition that claimants under the Defense Base Act can elect to pursue a state remedy in lieu of their federal remedy. In fact the federal law specifically declares that the federal remedy "shall be exclusive and in place of all other liability . . . under the workmen's compensation law of any state." 42 U.S.C. 1651 (c). Thus, whatever the result under state law, the federal remedy is exclusive and the state result is not *res judicata*. *Globe Indemnity Co. v. Calbeck*, 230 F.Supp. 9, 13 (1959).

III

The state award was \$17,500 payable at the rate of \$70 per week. After weekly payments aggregating \$4,270 had been made the unpaid balance of \$13,230 was commuted to its present value of \$12,549.91, and upon request and pursuant to an order of the California Industrial Accident Commission, the latter amount was paid over in a lump sum. In computing the amount of the federal award the defendant Deputy Commissioner credited plaintiffs with \$16,819.91, the actual amount paid over under the state award. Plaintiffs now argue that they were entitled to a credit of \$17,500 because this was the amount awarded under state law.

Once again plaintiffs have overlooked the fact that the federal remedy is exclusive. Credit for the amount already paid over is not given because an award was made by a state agency. Such credit is given because

he amount paid over should be treated as an advance payment on the federal liability. *Lawson v. Standard Dredging Co.*, 134 F.2d 771 (5th Cir., 1943). Consequently, credit was correctly given only for the actual amount paid.

Accordingly, the motion for summary judgment is hereby Granted.

Dated: March, 1965.

Albert C. Wollenberg,
United States District Judge.

In the United States District Court
for the Northern District of California,
Southern Division

Civil No. 42747

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,
Appellees.

Notice is hereby given of an appeal in the above-entitled matter by Flying Tiger Lines, Incorporated

and Employers Mutual Liability Insurance Company of Wisconsin from the order of the United States District Court issued on May 24, 1965, by District Judge Albert C. Wollenberg, which was an Order Granting Motion For Summary Judgment in Respect to Complaint For Injunction in respect to the award of a death benefit in favor of the appellees Thomas and David R. Landy, deputy commissioner for the 13th Compensation District, also an appellee herein.

Flying Tiger Lines, Inc., and Employers
Mutual Liability Insurance Company
of Wisconsin

By Hanna & Brophy

Attorneys for Appellants.

Filed July 16, 1965,

Frank Schmid, Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLYING TIGER LINES, INC., and
EMPLOYERS LIABILITY INSURANCE COMPANY,

Appellants,

v.

DAVID R. LANDY, Deputy Commissioner,
United States Department of Labor, and
PETER GREGORY THOMAS, MAUREEN ALTAIR
THOMAS, and TERRY AVA THOMAS, minor
children of Gregory Peter Thomas,
deceased,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE DEPUTY COMMISSIONER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20358

FLYING TIGER LINES, INC., and
EMPLOYERS LIABILITY INSURANCE COMPANY,

Appellants,

v.

DAVID R. LANDY, Deputy Commissioner,
United States Department of Labor, and
PETER GREGORY THOMAS, MAUREEN ALTAIR
THOMAS, and TERRY AVA THOMAS, minor
children of Gregory Peter Thomas,
deceased,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE DEPUTY COMMISSIONER

JURISDICTIONAL STATEMENT

This compensation appeal action was brought pursuant to Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 921(b), by appellants, the employer and its compensation insurance carrier, in the United States District Court for the Northern District of California against appellees, the deputy commissioner and surviving dependents of the employee

Gregory Peter Thomas. Appellants sought to set aside the deputy commissioner's compensation award of death benefits to the claimants who are joined as appellees herein. The district court granted the deputy commissioner's motion for a summary judgment, affirmed his award and dismissed the appellants' action. Judgment was entered May 24, 1965, and appellants filed notice of appeal on July 16, 1965; jurisdiction of this court rests on 28 U.S.C. 1291.^{1/}

STATEMENT OF THE CASE

The ultimate question to be resolved on this appeal is whether the district court correctly approved the deputy commissioner's award of benefits under the workmen's compensation provisions of the Defense Base Act, 42 U.S.C. 1651 et seq., incorporating the Longshoremen's Act, 33 U.S.C. 901 et seq., to the surviving dependents of a member of the crew of a Constellation aircraft operated by Flying Tiger Lines who was lost over the high seas, when his aircraft disappeared while proceeding from Travis Air Force Base, California, to Tan Son Nhut Air Base, Saigon, South Vietnam, in the performance of his employer's national defense public work service contract for

^{1/} A serious question exists as to jurisdiction of the appeal. The Notice of Appeal (R. 53, Appellants' App. 34) appeals from the Order Granting Motion for Summary Judgment, a non-appealable order. The notice refers, however, to the date of entry of judgment, May 24, 1965.

transporting military personnel. The underlying facts may be simply stated and are not in dispute.

The facts.--Flying Tiger Lines, Inc., entered into a contract with the United States Air Force, Contract No. AF-11(626)-389 and Service Order No. 29 S.O.M. thereunder, dated March 2, 1962. Pursuant to that contract Flying Tiger was required to carry certain military personnel from Travis Air Force Base to Saigon via Clark Air Force Base, Manila, P. I. Gregory Peter Thomas, the employee to whose survivors the death benefits were awarded by the Deputy Commissioner in the present case, was pilot on the flight.

The plane refueled at Agana, Guam, and proceeded on course toward Clark Air Force Base, Manila. At 1:30 A.M. on March 16, 1962, a merchant ship en route to Honolulu reported sighting vapor trails and a bright flash in the sky. The reported flash occurred at a point on the anticipated course of the aircraft at a time when the plane should have been there. The ship diverted its course and spent seven hours searching; extensive search was continued by the Air Force and Naval services until March 23, 1962. No evidence of plane debris or survivors was discovered.

The military authorities concluded and certified that the plane had crashed in the sea with the loss of all members of the

crew and military passengers.^{2/} An order of the Superior Court of Los Angeles County, California, was accordingly entered on September 28, 1962, establishing the fact of death on March 16, 1962. The California Department of Public Health issued thereon a "Court Order Delayed Certificate of Death" for Gregory Peter Thomas, the employee.

The state proceedings.--The widow and children of the deceased employee filed a claim for death benefits under the California Workmen's Compensation Act and on March 18, 1963, and the referee of the Industrial Accident Commission of California entered an order as follows (Tr. 208-210):

Application having been filed herein; all parties having appeared and the matter having been regularly submitted, the Honorable LEON H. BERGER, Referee, finds, awards and orders as follows:

FINDINGS OF FACT

1. Gregory Peter Thomas, died on March 16, 1962 as a proximate result of injury on the same day arising out of and occurring in the course of his employment by the Flying Tiger Line, Inc., whose insurance carrier was Employers Mutual Liability Insurance Company of Wisconsin.

2. Employee left surviving him, wholly dependent, Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, wholly dependent minor children.

3. No burial expense was incurred by the applicants.

^{2/} Litigation involving the rights of dependents of the military passengers to recover damages from Flying Tiger has already been before this Court. Warren v. Flying Tiger Line, 9th Cir. No. 19,572

4. Doreen M. Thomas is neither a necessary nor proper party applicant herein.

5. The reasonable value of the services of applicant's attorney is \$750.00.

A W A R D

AWARD IS MADE IN favor of Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, minors against Employers Mutual Liability Insurance Company of Wisconsin, of \$17,500, payable as follows:

To Doreen M. Thomas as Guardian ad Litem and trustee for Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, minors, \$3,710.00 payable forthwith and \$70.00 weekly thereafter beginning March 24, 1963, until paid, together with interest provided by law; less \$750.00 payable to J. Wallace McKnight, whose lien is hereby allowed.

After weekly instalments totalling \$4,270.00 had been made the Industrial Accident Commission issued an order approving a request for lump sum payment commuting the remaining unpaid balance of \$13,230.00 to a then present value of \$12,549.91, with the result that the total payments made by the appellants amounted to \$16,819.91.

The deputy commissioner's proceedings.--The employee's survivors also filed a claim under the Defense Base Act, incorporating Longshoremen's Act, 33 U.S.C. 930(a), and a hearing was held on that claim on July 7, 1964.

At the hearing before the deputy commissioner, the appellants controverted the claim on the ground that it "does not come under the purview of the Defense Bases Acts" because "this employment was not in relation to a defense base and was not under a public

works contract within the meaning of the law and that there was also the election of remedies under the state act" (Tr. 8-9). They further contended that in the event of a federal award the employer and insurance carrier were entitled to credit for the full amount of \$17,500 because "under the state law, paying a lesser sum by commuted value, we had gained legally full payment" (Tr. 10-11).

The deputy commissioner received in evidence the contract documents pursuant to which the public services were being rendered by Flying Tiger to the Air Force at the time of the fatal accident. These include the Call Contract, No. AF-11(226) 389, effective October 1, 1961, between the Air Force and Flying Tiger (Tr. 29, Ex. J, 59-206), and the Service Order, No. 29, calling for transportation of 99 persons from Travis to Saigon (Tr. 30-31, Ex. K, 207). These instruments clearly show that the "services to be furnished" by the contractor were "air transportation services" (Tr. 71) and throughout the contract the specifications described in detail the "requirements for performance of services" (Tr. 73 et seq.).

No contention was made before the deputy commissioner, in the opening statement or later, nor was any evidence offered as to the employee's exclusion from Defense Base Act coverage on the ground that as pilot of a Constellation aircraft he was "a master or member of a crew of any vessel" within the meaning of 42 U.S.C. 1654 and 33 U.S.C. 903(a)(1). It was stated that in the case of two of the eleven crew members who were lost, the

employer and insurer were making voluntary payments under the Defense Base Act "under a contract with the union requiring such payments" (Tr. 43). Although invited by the deputy commissioner to offer further evidence, the employer and carrier, after reflection, offered nothing more (Tr. 45).

The deputy commissioner issued his compensation order on August 7, 1964, as follows:

In the matter of a claim for death benefits filed under the Acts of Congress of August 16, 1941 and December 2, 1942 (42 USCA 1651-1654) for an injury occurring in the course of an employment for the United States outside the Continental United States in the Pacific Compensation District, and said claim having been transferred to the undersigned Deputy Commissioner of the 13th Compensation District by the Deputy Commissioner of the Pacific Compensation District, with the approval of the Bureau of Employees' Compensation, and such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on the 15th day of March, 1962, the deceased employee above named was in the employ of the employer above named as an Airline Pilot on a Public Works Contract number A.F. 11 (626)-389 to transport Army personnel outside the Continental United States in the Pacific Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by the Acts of Congress of August 16, 1941 and December 2, 1942 (42 U.S.C.A. 1651-1654) and that the liability of the employer for compensation under said Acts was insured by the Employers Mutual Liability Insurance Company of Wisconsin;

2. That on said day the employee was assigned by the employer as a Pilot on a Constellation Aircraft number 69213, under an Air Force Service Order number 29, dated March 2, 1962, to carry Army personnel from Travis Air Force Base, California, to

Tan Son Nhut Air Base, Saigon, Viet Nam via Clark Air Base, Manila, Philippine Islands; that the aircraft had refueled at Agana, Guam and was apparently proceeding on course to Clark Air Force Base, Manila;

3. That at 1.30 A.M., March 16, 1962 a merchant vessel enroute to Honolulu reported sighting vapor trails and a bright flash in the sky approximately seventeen miles northeast of its position; that the location of the reported flash was on the anticipated course of the aircraft and, if the plane had continued its plotted course and speed, it was where the aircraft should have been at that time; that an intensive air and sea search failed to find any evidence of the plane, debris or survivors; that the military authorities concluded that for an unknown reason the plane crashed into the ocean and all members of the crew and military passengers perished; that the death of the employee arose out of and in the course of the employment;

4. That written notice of death was not given to the employer within thirty days, but that the employer had knowledge of the death and has not been prejudiced by the lack of such written notice;

5. That the average weekly wages of the employee herein at the time of his death amounted to \$425.93;

6. That Peter Gregory Thomas, born on July 6, 1950, Maureen Altair Thomas, born on March 1, 1952, and Terry Ava Thomas, born on July 15, 1953, are the surviving minor children of the employee, and they are entitled to death benefits at the rate of \$68.25 per week (65 per cent of \$105.00, 35 per cent for one child increased by 15 per cent for each child in excess of one) payable in equal shares;

7. That death benefits payable to all beneficiaries shall be subject to the limitations of the Act, with respect to the maximum weekly rate, continuing dependency and age;

8. That death benefits due in behalf of the surviving minor children of the employee shall be payable to Mrs. James Unger (formerly known as Mrs. Doreen M. Thomas) their mother and legal guardian;

9. That accrued death benefits due and payable in behalf of the three minor children from March 16,

1962 to July 7, 1964, inclusive, (date of the last hearing) 120-5/7 weeks at the combined rate of \$68.25 per week amount to \$8238.75;

10. That the employer and insurance carrier have paid \$16,819.91 in error under an award by the Industrial Accident Commission of the State of California in behalf of the three minor children as death benefits and they are entitled to a credit for such payment.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following:

AWARD

That the employer, Flying Tiger Lines, Incorporated and the insurance carrier, Employers Mutual Liability Insurance Company of Wisconsin, shall pay death benefits as follows:

To Mrs. James Unger (formerly known as Mrs. Doreen M. Thomas) in behalf of Peter Gregory Thomas, Maureen Altair Thomas, and Terry Ava Thomas, 120-5/7 weeks at the combined rate of \$68.25 per week from March 16, 1962 to July 7, 1964 inclusive, (date of the last hearing) amounting to \$8238.75. The employer and insurance carrier having paid the sum of \$16,819.91, which amount is \$8581.16 in excess of the death benefits accrued to July 7, 1964 inclusive, shall be given credit for such payment as it may extend into the future and thereafter shall continue payments of death benefits at the combined rate of \$68.25 per week in biweekly installments, subject to the limitations of the Act in respect to age and continuing dependency.

The district court proceedings.--As already noted, appel-

lants instituted the present action to set aside the deputy commissioner's award. Appellants' complaint alleges that "no express issue of jurisdiction was raised in the proceedings before the California Industrial Accident Commission but it will be conceded that the power to make an award of benefits was lacking unless the Commission possessed the necessary jurisdiction to

take such action (Para. XIII, R. 03-04). The complaint does not allege, either in reciting the contentions raised at the hearing before the deputy commissioner (Para. XVIII, R. 05) or in specifying the errors committed by the deputy commissioner (Para. XXII, R. 06), that decedent's fatal injury was excluded from Defense Base Act coverage because the pilot of the Constellation aircraft was a master or member of the crew "of any vessel." This issue was first raised by appellants in briefing and argument before the District Court (R. 37-40).

The district court's opinion, affirming the deputy commissioner's award, is reproduced in the record (R. 46-51) and appears in appellants' appendix (pp. 26-33). The court below found that in the light of the legislative history and previous case interpretation of the Act, the service contract here in question was for a "public work" and was therefore subject to the Defense Base Act (App. 30), and that the deceased employee, as pilot of the Constellation, was not "a master or member of a crew of any vessel" within 42 U.S.C. 1654 and 33 U.S.C. 903(a)(1). That exception, the court held^{3/}, refers only to seamen within the protection of the Merchant Marine (Jones) Act, 46 U.S.C. 688 (App. 31).

The court below further found that although the state award was res judicata between the parties under state law, the Defense

^{3/} Citing Warner v. Goltra, 293 U.S. 155, 159-160 (1934) and South Chicago Co. v. Bassett, 309 U.S. 251, 256 (1939).

Base Act remedy is exclusive and the state result is not res judicata against a federal award (App. 31-32). Finally it held that appellants were entitled to credit only for \$16,819.91 actually received by the claimants and not for the \$17,500.00 allowable under state law (App. 32-33). The district court accordingly affirmed the compensation order and dismissed appellants' complaint on the merits (R. 52). From this judgment the present appeal was taken (R. 53).

STATUTE INVOLVED

The pertinent sections of the Defense Base Act, as amended, 42 U.S.C. 1651 et seq., provide:

42 U.S.C. 1651:

(a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment--

* * * *

(4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subdivision, for the purpose of engaging in public work, and every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such

public work under such contract the payment of compensation and other benefits under the provisions of this chapter, and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, but nothing in this paragraph shall be construed to apply to any employee of such contractor of subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

(b) As used in this section--

(1) the term "public work" means any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project;

(2) * * *;

(3) the term "war activities" includes activities directly relating to military operations;

(4) the term continental United States means the States and the District of Columbia.

(c) The liability of an employer, contractor (or any subcontractor of subordinate subcontractor with respect to the contract of such contractor)

under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

ARGUMENT

The ultimate issue in this case is whether the finding of the deputy commissioner--that the fatal injury to the employee was subject to the compensation provisions of the Defense Base Act--was supported by substantial evidence. The rule applicable to judicial review of compensation orders, as recently reiterated by the Supreme Court in O'Keefe v. Smith Associates, 380 U.S. 359, 362 (1965), is that the findings of the deputy commissioner "are to be accepted unless they are irrational or 'unsupported by substantial evidence on the record * * * as a whole.'" ^{4/}

Appellants contend that the deputy commissioner's award of benefits to the employee's dependents in this case is contrary to law because the public works service contract here involved is not within the meaning of 42 U.S.C. 1651(b)(1) and because the employee as pilot of a Constellation aircraft was specifically excepted from coverage as "a master or member

^{4/} Accord: O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947).

of the crew of any vessel" by 42 U.S.C. 1654 and 33 U.S.C. 903(a)(1). They further contend that the dependents are barred by the election of California state compensation.

We show in this brief that that deputy commissioner's award was in accord with the natural meaning of the statutory language, with the legislative intent and with the judicial precedents under the Act, and that it was fully supported by substantial evidence on the record as a whole; it was therefore in all respects in accordance with the law. We further show that the acceptance of compensation under the state award was not an election which waived or released claimants' federal rights, but merely entitled appellants to credit for the amounts received by the claimants.

I. Decedent's employment was within the coverage of the Defense Base Act.

1. The deceased aircraft pilot was employed in the performance of a public work contract within the meaning of the Act. Since its amendment in 1958 the public works covered by the Defense Base Act are defined in 42 U.S.C. 1651(b)(1) as follows:

(1) The term "public work" means any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.
[Emphasis added]

Until its amendment in 1958 the definition was less specific in its terms and read as follows:

(b) As used in this section, the term "public work" means any fixed improvement or any project involving construction, alteration, removal, or repair for public use of the United States or its Allies, including but not limited to projects in connection with the war effort, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

Even under this more restricted language the federal courts had upheld an award of federal compensation under the Act even though concurrently the New York courts were upholding awards in similar situations under the New York state act.

In Republic Aviation Corp. v. Lowe, 69 F. Supp. 472, 476, 479 (SDNY 1946), aff'd 164 F. 2d 18 (2d Cir. 1947), cert. den. 333 U.S. 845, an award for the overseas death of the pilot of a defense base contractor's plane was upheld. There the contract was to furnish the Government with technical personnel including test pilots (p. 473). The pilot performing under the contract was killed in the crash of a plane he was testing. The employer and insurer contended, as in the present case, that the service contract was not for a "public work" and the employment thus not within the Defense Base Act. The court rejected the contention that by referring to contracts involving fixed improvement, construction, alteration, removal or repair, Congress had excluded work not fixed at a permanent location and thus the pilot's services were not "one of the species of work set forth in the statutory definition" (id. 475). The

court held the definition's reference to "projects in connection with the war effort" was "a very broad term and should be liberally construed in line with the public policy of protection for the employees" (p. 479).

The New York courts meanwhile upheld awards under the New York state compensation act in similar circumstances, employing the principle of the twilight zone of overlapping state and federal remedies. It is upon these cases which appellants now rely.^{5/} In 1958, however, Congress amended the definition of "public work" by Public Law No. 85-608, 72 Stat. 537, so as expressly to resolve any doubt concerning federal coverage which might have arisen from the application by the New York courts of the twilight zone principle in sustaining awards under state law.

The amendment inserted the words "whether or not fixed" following the phrase "in the project" and the clause "projects or operations under service contracts and projects in connection with the national defense or with was activities" was substituted for "projects in connection with the war effort."

^{5/} Walker v. American Overseas Airline, Inc., 275 App. Div. 974, 90 N.Y.S. 2d 547, 538 (1949), appellants' chief reliance, Br. 13, was a per curiam decision on the authority of Hammond v. Albany Garage Co., 237 App. Div. 647, 47 N.Y.S. 2d 897 (1944) a maritime twilight zone case discussing the evolution of Davis v. Department of Labor, 317 U.S. 249 (1942) out of the original rule of Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

An explanation for this change was given in S. Rep. No. 1886, 85 Cong., 2d Sess., 1958 U. S. Code Cong. & Adm. News, 3321, 3324, 3330. Summarizing the purpose of the amendment, the Senate report said at p. 3324:

To redefine the term "public work" so as to clarify its meaning and make it construe consistently with Federal court decisions. It was the intention of Congress that this term would cover both fixed and movable projects including service projects. Some State court decisions have disregarded this congressional intent, presumably because the purpose is not explicitly spelled out in the act, and have imposed further State liability upon employers in a manner inconsistent with the underlying purposes of the act. By redefining the term "work work" to include the words "whether or not fixed," the original intention to have it apply to projects of all kinds otherwise within the definition, including service contract projects, is reaffirmed.

After the amendment, as before, no case has set aside a Defense Base Act compensation award to a member of a crew of an aircraft performing overseas flights pursuant to a public work service contract. Since the amendment the contention has been twice rejected; the last time by the court below (R. 36-37; App. 28, 30), previously by Judge Beeks in Alaska Air Lines v. O'Leary, 216 F. Supp. 540-543 (W.D. Wash. 1964), vacated 336 F. 2d 668 (9th Cir. 1965).

2. The deceased aircraft pilot was not "a master or member of the crew of any vessel" within the exception from coverage contained in 42 U.S.C. 1654(3) and 33 U.S.C. 903(a)(1). Before the deputy commissioner the question of the "vessel" status of

the Constellation aircraft, a non-amphibious and indeed non-floatable airplane, was not raised by appellants (Tr. 8-11). Accordingly, no evidence on the question was offered and under established principles of review the issue is not open for appellants in this Court.^{6/}

If the issue is to be considered, this Court, presumably, can notice judicially that a Constellation is not a Flying Boat, such as Judge Cardozo had for consideration in Reinhart v. Newport Flying Service Corp., 232 N. Y. 115, 133 N.E. 371 (1921), relied on by appellants. Whatever may be said of a Flying Boat, a Constellation is not a structure capable of being, or intended to be used, as a means of transportation "on water," cf. 1 U.S.C. 3; 46 U.S.C. 801.

Appellants' contention that claimants' proper remedy is maritime, as dependents of a vessel crew member, excluded from compensation is novel. From its original enactment in 1941, the Defense Base Act has contained an exception in 42 U.S.C. 1654 for injuries or deaths of employees under the Federal Employees' Compensation Act, 5 U.S.C. 751 et seq., or engaged in agriculture, domestic or casual employment and "(3) a master or member of a crew of any vessel." This exception corresponds

^{6/} "If the point now raised had been urged at the hearing, abundant evidence would have been forthcoming." Metropolitan Cas. Ins. Co. v. Hoage, 89 F. 2d 798, 800 (D. C. Cir. 1937); Maryland Cas. Co. v. Cardillo, 107 F. 2d 959, 961 (D.C. Cir. 1939). This is a corollary of the rule that review is on the basis of the evidence before the administrative authority not by other evidence not produced. United States v. Carlo Bianchi & Co., 373 U.S. 709, 714-715 (1963).

to 33 U.S.C. 903(a)(1) in identical language. Down to the time of the 1958 amendments it had not been urged that the exceptions related to aircraft crew members.

The 1941 Congressional reports contained no explanation. They merely state that an exception of vessel crew members has been made.^{7/} There was no need of explanation, since Warner v. Goltra, 293 U.S. 155, 159-160 (1934), and South Chicago v. Bassett, 309 U.S. 251, 256-261 (1940), had recited the legislative history and purpose of that language to exclude from federal compensation coverage all masters and members of crews of any vessels, since their representatives, unlike those of the longshoremen and ship repairmen, insisted that they wished to retain their maritime remedies by suit for maintenance, unseaworthiness and damages under the Merchant Marine (Jones) Act, 46 U.S.C. 688.

The contention that aircraft crew members are members of the "crew of any vessel" appears to have been urged in only two cases prior to the present. In Stickrod v. Pan American Airways Co., 1941 U.S. Av. R. 69, 1 CCH Avi. Cas. 942 (S.D.N.Y. 1941), not otherwise reported, the dependents of a flight engineer of a Sikorsky Flying Boat, lost over the Pacific, brought a Jones Act suit against his employer. The court dismissed the complaint on defendants' motion, on the ground that a flying boat is not a vessel; no appeal was taken. In the

^{7/} H. Rep. No. 1070, S. Rep. No. 540, 77th Cong., 1st Sess.

next case, Alaska Airlines v. O'Leary, 216 F. Supp. 540 (W.D. Wash. 1963), vacated 336 F. 2d 668 (9th Cir. 1965), Judge Beeks did not reach the point since he held an injury within the United States was in any event not intended to be covered by the Defense Base Act.

The court below, citing the Warner and South Chicago cases, but not Stickrod, reached the same result and held Mr. Thomas not to be excluded from Defense Base Act coverage (R. 49, App. 31).

Supporting the decisions in Stickrod and the court below are many similar cases holding that an aircraft is not a vessel for purposes of shipowners' limitation of liability;^{8/} nor for the purpose of in rem liability for repairs;^{9/} nor for the purpose of punishing over-water offenses on aircraft flight.^{10/} The British cases are in accord.^{11/}

^{8/} Dollins v. Pan American Grace Airways, 27 F. Supp. 487 (S.D.N.Y. 1939); Noakes v. Imperial Airways, 29 F. Supp. 412 (S.D.N.Y. 1939), 46 U.S.C. 183 et seq.

^{9/} United States v. Northwest Air Service, 80 F. 2d 804, 805 (9th Cir. 1935); and Foss v. The Crawford Bros. No. 2, 215 Fed. 269 (W.D. Wash. 1914).

^{10/} United States v. Peoples, 50 F. Supp. 462, 463 (N.D. Calif. 1943); United States v. Cordova, 89 F. Supp. 298 301-302 (E.D.N.Y. 1950).

^{11/} Watson v. R.C.A. Victor Co., 1935 A.M.C. 1251, 50 Lloyd's L.R. 77; Polpen Shipping Co. v. Commercial Union, 1943 A.M.C. 438, 74 Lloyd's L.R. 157 (K. B. Div.)

Appellants' citation of cases, holding aircraft to be subject to salvage liens and their crews or passengers on flights over and above the ocean to be subject to the Death on the High Seas Act, are in no wise inconsistent. As the court pointed out in the Warner and South Chicago cases, our concern here is with the meaning of the expression "crew of any vessel" as used in this particular statute having "appropriate regard to its distinctive aim."

In sum, the deceased employee was covered by the Defense Base Act. As conclusively shown by the preceding discussion and by the facts outlined above in our Statement, there was abundant evidence to support the Deputy Commissioner's finding that the employee was engaged in the performance of a service contract for public work. It is also clear that he was not excepted as a member of the crew of any vessel. Thus, the right of his dependents to receive an award of death benefits under the Act is equally clear.

II. Claimants' acceptance of the state compensation award was not an election to waive or release their federal rights.

While appellants assert that claimants' rights to benefits under the Longshoremen's Act are barred by res. judicata, estoppel or election, their complaint expressly admits that there was no actual adjudication of that issue by the state tribunal. The complaint alleges (Para. XIII, R. 03-04):

No express issue of jurisdiction was raised in the proceedings before the California Industrial

Accident Commission, but it will be conceded that the power to make an award of benefits was lacking unless the Commission possessed the necessary jurisdiction to take such action.

Appellants thus admit that their contention that claimants have waived or released their federal rights contrary to the prohibition which Congress wrote in 33 U.S.C. 908(1), 915(b) and 916, is founded entirely on implication.

This is confirmed by the state compensation order itself which contains no finding whatsoever concerning jurisdiction (Tr. 208-210, supra, p. 4). It does not even find that the contract of employment was entered into in California and the injury occurred outside the state over the high seas so as to bring it within California Labor Code § 5305.^{12/}

1. No case involving any federal compensation act has ever held that acceptance of a state award works an estoppel by judgment or binding election of remedies barring claimants' federal rights. Every decided federal case is to the contrary. Recently, a host of state cases have similarly upheld second awards for the difference in benefits under two state acts in cases falling within the shoreside twilight zone of overlapping state remedies between the state of the employment relation and the state of the place of injury.

The Supreme Court in Calbeck v. Travelers Ins. Co., 370 U.S. 114, 131-132 (1962), cited with approval decisions of this

^{12/} See King v. Pan American World Airways, 270 F. 2d 355 (9th Cir. 1959), cert. den. 362 U.S. 928.

and other courts declaring an adjudicated state award did not bar a federal remedy. Thus in Western Boat Bldg. Co. v. O'Leary, 198 F. 2d 409, 411 (9th Cir. 1952) this Court said:

Appellants contend that the Washington Workmen's Compensation Act provided the exclusive remedy to Markovich [the injured employee]. This argument necessarily implies that payment of compensation under state law ousts the federal jurisdiction. With such a statement we cannot agree * * *. Even if it is assumed arguendo, however, that the Washington Commission had adjudicated and granted the award under the state act, we do not regard such action as constituting a bar to claimant's rights under federal law.

Earlier, in Newport News S.B. & D.D. Co. v. O'Hearne, 192 F. 2d 968, 969-970, 971 (4th Cir. 1951), the Court concluded:

It is true that the Virginia Commission accepted jurisdiction in this instance and awarded compensation, and that the courts have been inclined in doubtful cases to uphold awards by state as well as by federal administrative authority; * * * There is of course no merit in the point that the widow, having first made application to the state body, is bound by her election even though, as it now appears, the state commission had no jurisdiction in the premises. Justice is done by the requirement of the District Court that the sums heretofore paid for compensation under the award of the state compensation shall be credited upon the award of the Deputy Commissioner.

We believe these cases are controlling here.^{13/}

^{13/} Accord: Globe Indemnity Co. v. Calbeck, 230 F. Supp. 9, 11-13, 17 (S.D. Tex. 1959); United States F & G Co. v. Lawson, 15 F. Supp. 116, 119 (S.D. Ga. 1936), payments under finally adjudicated state awards; Great Lakes D. & D. Co. v. Brown, 47 F. 2d 265 (N.D. Ill. 1930), payments under finally adjudicated state award continued by agreement. See also Massachusetts Bonding & Ins. Co. v. Lawson, 149 F. 2d 853, 854 (5th Cir. 1945) and Holland v. Harrison Bros., 306 F. 2d 369, 373 (5th Cir. 1962), payments of settlement under state acts.

Since Industrial Commission v. McCartin, 330 U.S. 622, 628 (1947), limiting the Court's prior decision in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943), it has been settled that a compensation award or judgment in one jurisdiction gives the employer and insurer only a credit for the amounts received by the beneficiaries. Cramer v. State Concrete Corp., 39 N.J. 507, 189 Atl. 2d 213, 214, 215-216 (1963), in holding that acceptance of the award did not operate as a waiver or release, the New Jersey court said:

The question is not whether an employee should be permitted to bring multiple suits to enforce the same right, but whether his pursuit of a right under the laws of one state should bar the pursuit of a distinct right under the laws of another state. As a matter of fairness the employee should receive "the highest available amount of compensation" to which he is entitled, so long, of course, as credit is given for payments received. * * * It would be unjust to charge a workman with an "election" or "estoppel" because of an uninformed choice. Moreover, our State has a special interest in the enforcement of its own compensation plan, so much so that the parties cannot bargain away any part of the employee's scheduled benefits. * * * In short the payment of anything less than the employee's full due is repugnant to the policy of our law.

Accord: Industrial Indemnity Exch. v. I. A. C., 80 Cal. App. 2d 480, 182 Pac. 2d 309, 312 (1947).^{14/}

^{14/} See also Cline v. Byrne Doors, 324 Mich. 540, 37 N.W. 2d 630, 633-634, 636 (1949); Yoshi Ogino v. Black, 278 App. Div. 146, 104 N.Y.S. 2d 82, 86 (1951), aff'd 304 N.Y. 872, 109 N.E. 2d 884; Lavoie's Case, 334 Mass. 403, 135 N.E. 2d 750, 751, 754 (1956); Martin v. L & A Contracting Co., 249 Miss. 441, 162 So. 2d 870, 872 (1964); Groendyke v. Gardner, --- Okla. ---, 353 Pac. 2d 695, 699 (1960); Sorenson v. Standard Const. Co., 238 Minn. 68, 55 N.W. 2d 630, 631 (1952); Spiez v. Ind. Com., 251 Wis. 168, 28 N.W. 2d 354, 355, 359 (1947).

2. In view of 42 U.S.C. 1651(c) making the Defense Base Act exclusive of state compensation acts, there can be no implication of res judicata, estoppel by judgment, or election barrin claimants' federal rights. The California Commission had no authority to decide the question of claimants' federal rights but in any case its order made no finding concerning claimants' federal rights. Since the two claims are under different statutes and the two causes of action are not the same, there can be no res judicata.^{15/} Nor can be estoppel by judgment here where the first tribunal has not adjudicated claimants' rights to the California remedy as exclusive of their federal rights. Estoppel by judgment does not apply unless the record of the first tribunal clearly shows it made a considered decision of the precise issue on the basis of the evidence.^{16/}

So far as the record here indicates, claimants' federal rights were a defense available to appellants before the

^{15/} See Dixie S. & G. Co. v. Holland, 255 F. 2d 304, 310 (5th Cir. 1958); Peckham v. Family Loan Co., 196 F. 2d 838, 841 (5th Cir. 1952); Parkinson v. California Co., 233 F. 2d 432, 437-438 (10th Cir. 1956); Davis v. St. Paul-Mercury Indemnity Co., 294 F. 2d 641, 643 (4th Cir. 1961); Parker v. Sager, 174 F. 2d 657, 661 (D.C. Cir. 1949); Restatement of Judgments, § 68.

^{16/} Hoffman v. New York, N.H. & Hartford R.R. Co., 74 F. 2d 227, 230 (2d Cir. 1934), cert. den. 294 U.S. 715; Bretsky v. Lehigh Valley R.R. Co., 156 F. 2d 594, 596 (2d Cir. 1946); Guldry v. Ocean Drilling Co., 244 F. Supp. 691, 692 (E.D. La. 1965); Smith v. Service Contracting Co., 236 F. Supp. 492, 495 (E.D. La. 1964); Zimmerman v. Scandrett, 57 F. Supp. 799, 805 (E.D. Wis. 1944). See Mike Hooks v. Pena, 313 F. 2d 696, 700 (5th Cir. 1963).

California tribunal which was not passed upon because Appellants waived by failing to assert it. Certainly the record shows no election by Claimants in the proceedings before the California tribunal to waive or release their federal rights. Indeed, any attempt to do so would be invalid.^{17/}

In sum, as the court below has correctly held, nothing about the California state proceedings has barred the claimants' rights to this present award of Defense Base Act benefits.

CONCLUSION

For the foregoing reasons we believe that the decision below was clearly correct and should be in all respects affirmed.

Respectfully submitted,

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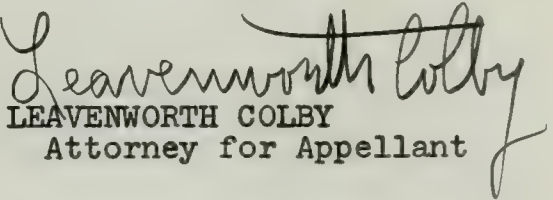
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December 1965

^{17/} Such waiver would necessarily be expressly contrary to 42 U.S.C. 1651(c) and 33 U.S.C. 908(i), 915(b) and 916. To apply the rule of res judicata or election not only violates the statutory prohibition against waiver or release, but permits the very overreaching by insurance carriers that prohibition was designed to prevent. Horowitz, Workmen's Compensation (1944), p. 41; See 56 Yale L. J. 562, 568 (1947), for examples.

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


LEAVENWORTH COLBY
Attorney for Appellant

No. 20,358
United States Court of Appeals
For the Ninth Circuit

FLYING TIGER LINES, INCORPORATED,
and
EMPLOYERS MUTUAL LIABILITY INSUR-
ANCE COMPANY OF WISCONSIN,
Appellants,
vs.

DAVID R. LANDY, Deputy Commissioner
for the 13th Compensation District,
and

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,
Appellees.

FEB 10 1967

On Appeal from the United States District Court
for the Northern District of California

APPELLANTS' RESPONSE TO
DEPUTY COMMISSIONER'S SUPPLEMENTAL
REPLY MEMORANDUM

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No. 20,358

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DEPUTY COMMISSIONER'S SUPPLEMENTAL
REPLY MEMORANDUM**

Pursuant to request of the Court a supplemental memorandum has been filed in support of the decision

of the deputy commissioner and the Court below. This supplemental memorandum was directed solely to the failure of the deputy commissioner to give the carrier full credit for the amount of the state commission award, when that award had been paid in full by the carrier.

Additional time was granted to appellants within which to prepare and file a response to the deputy commissioner's supplemental memorandum. Our response follows.

A. THE SUPPLEMENTAL MEMORANDUM OFFERS THE SPURIOUS CONTENTION THAT SINCE CREDIT HAS NEVER PREVIOUSLY BEEN ALLOWED IN EXCESS OF AMOUNTS PAID IN OTHER CASES, THIS IS PROBATIVE OF SOMETHING.

The argument answers itself, since the point is admittedly one of first impression (see lines 1-3 under "Statement" at page 1 of the supplemental memorandum). Since there has never heretofore been an occasion for requesting credit for an amount greater than actually paid, why in the name of common sense should it be "significant" that "no reported case has ever allowed" such a credit. Obviously, the contention falls of its own weight since it is clear that neither commissioner nor Court could ever allow credit for an amount exceeding that which had been requested.

B. IN THE INSTANT CASE, COUNSEL FOR THE APPELLANTS (PLAINTIFFS) EXPRESSLY REQUESTED CREDIT FOR THE FULL \$17,500.00 WHICH HAD BEEN SATISFIED BY THE CARRIER THROUGH PAYMENT IN CONFORMITY WITH STATE COMMISSION ORDERS.

The record shows that the award of the state commission was in the amount of \$17,500.00; and that it was satisfied by the carrier, not only in full, but expressly in conformity with the orders of the commission itself. This was not a voluntary payment on the carrier's part, nor one to which it agreed. The lump sum payment was sought by the respondents Thomas, it was a matter of formal determination by the state commission, and the carrier was obliged, like it or not, to make payment in accordance with the commission's order.

When the carrier was forced to re-litigate the whole matter once more before the deputy commissioner, its counsel caused the record to show the orders of the state commission and its payments thereunder, and made it very plain to the deputy commissioner that the carrier was requesting credit for the full \$17,500.00 which it had satisfied by its compulsory compliance with commission orders.

The supplemental memorandum offers the novel suggestion that the carrier "allowed the hearing to be closed without any attempt whatever to request approval of commutation by the deputy commissioner and the Secretary". Having set up this "straw man", the memorandum proceeds to demolish it with the argument that "appellants cannot obtain from the courts relief they did not ask before the deputy commissioner."

Such a contention presupposes that the only way that the carrier could obtain credit for the full \$17,500.00 for which it was liable under the state award, would have been to take the initiative in requesting the deputy commissioner to grant a lump sum payment. In our view, such a contention begs the question. The carrier did not then, nor does it now, concede that the deputy commissioner even had jurisdiction of the case, let alone asking him to grant a commutation covering a payment which it had already been compelled to make in another jurisdiction to the same respondents.

To drag in the idea that federal credit could only be granted via the federal commutation route is, as we view the matter, purely a non-sequitur. Either the carrier was entitled to full credit, or it was not, and the question of a commutation never entered anybody's mind at that time, least of all the deputy commissioner's. The contention is in the nature of a convenient afterthought to find support for an indefensible failure to grant full credit.

C. PRECEDENT REQUIRES THAT THE CARRIER BE GRANTED CREDIT BY THE DEPUTY COMMISSIONER FOR PAYMENT UNDER THE STATE AWARD, AND THE RECORD HERE SHOWS THAT THE CARRIER WAS OBLIGATED FULLY TO SATISFY THE STATE AWARD OF \$17,500.00.

It is well settled that the carrier is entitled to credit by the deputy commissioner when it has been obliged to make payment under the state award. *Lawson v. Standard Dredging Co.*, 134 Fed. 2d 771. It was

originally contended before the District Court that "credit is given for actual payment . . . not for the mere award which might never in fact be paid." As we have hitherto pointed out, this is a contention which might be raised in regard to an unpaid award; it cannot apply where, as here, the state award has been fully paid.

But it is now argued by the supplemental memorandum that credit for the full \$17,500.00 of liability discharged by the carrier under the state award could not be granted because payment of that amount had not actually been "made", nor had the smaller commuted value been approved by the deputy commissioner. We have heretofore suggested that the matter of commutation approval by the deputy commissioner is in the nature of a "red herring". It is the carrier's position the payment of the full \$17,500.00 was in fact made by the carrier, partially in cash and partially in the form of prepaid interest. Exactly what the carrier was obliged to pay under the state award was fully reflected by the record, and therefore was before the deputy commissioner by reason of the request for full credit. He should not have disregarded it as he clearly has done.

D. THE NET RESULT OF THE FAILURE TO GRANT FULL CREDIT, IF PERMITTED TO STAND, WILL BE TO GIVE THE RESPONDENTS THOMAS A DOUBLE RECOVERY.

This Court can take judicial notice of the fact that cash payable in a lump sum is always worth more than the same amount paid in installments over a future period of time. The difference in present value and installment payments is measured by statute at 3% under the California law and 4% under the federal statute. When the carrier was compelled to pay forthwith a liability not then due under the original award or the law itself, it was obliged to surrender the use of funds on which it could have and would have been able to gain at least the difference between its full liability of \$17,500.00 and the cash payment actually made.

The point is that the carrier, had it not been forced by the demand of the respondents Thomas for a commutation and the granting of that demand by the state commission, would have had the equivalent of more than \$17,500.00; for it would most certainly have realized more than the 3% interest involved in making such a lump sum payment. Conversely, the respondents Thomas, if permitted to retain the advance payment which the carrier was compelled to make under the state's commutation order, are gaining a double recovery. By the state order, they gain the cash; by the federal order they also gain the interest on the use of the money. This is a simple form of double recovery, and comes under the head of eating one's cake and having it too, with the deputy commissioner's able assistance.

The supplemental memorandum has much to say about acting in the "interest of justice." In the carrier's view, technicalities are being invoked to avoid a disposition on that basis through failure to grant the full credit expressly requested on behalf of the carrier and amply justified by the facts in the record.

CONCLUSION

The supplemental memorandum is replete with citations dealing with federal commutations, a subject which, in our view, is irrelevant to the problem before the Court. If we are correct, the citations are equally irrelevant.

We urge that the motion for summary judgment and for a dismissal of our complaint be denied, and that the order and award of the deputy commissioner be vacated, annulled and set aside.

Dated, San Francisco, California,
August 30, 1966.

HANNA & BROPHY,
Attorneys for Appellants.

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Peter Thomas, Deceased,

Appellees.

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APPELLANTS' REPLY BRIEF

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No. 20,358

**United States Court of Appeals
For the Ninth Circuit**

FLYING TIGER LINES, INCORPORATED,
and
EMPLOYERS MUTUAL LIABILITY INSUR-
ANCE COMPANY OF WISCONSIN,
Appellants,
vs.

DAVID R. LANDY, Deputy Commissioner
for the 13th Compensation District,
and

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,
Appellees.

APPELLANTS' REPLY BRIEF

In the last analysis, the question to be determined in this matter is one of jurisdiction. Does the federal deputy commissioner have the power to pass upon a claim already heard and fully determined, at the request of the claimants, by a state tribunal?

I.

IT IS THE POSITION OF APPELLANTS THAT THE DEPUTY COMMISSIONER DID NOT HAVE JURISDICTION TO TRY THIS CASE.

(1) The nature of jurisdiction.

Jurisdiction over a particular case is the power to hear and determine that case. *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70. Jurisdiction is fundamental and it is jurisdiction alone that gives a court the power to hear, determine and pronounce judgment on the issues before it. *In Re Cavitt*, 47 Cal. App. 2d 698.

The first question that must be determined by a court in any case before it is that of jurisdiction. *Cohen v. Barrett*, 5 Cal. 195; *Clary v. Hoagland*, 6 Cal. 685; *Dillon v. Dillon*, 45 Cal. App. 191; *Fitzpatrick v. Sonoma County*, 97 Cal. App. 588. In this connection, jurisdiction of the parties is as necessary as jurisdiction of the subject matter. *Inga v. Blum*, 134 Cal. App. 398.

(2) Jurisdiction is an issue which may be raised at any time or place.

Schuler-Knox Co. v. Smith, 62 Cal. App. 2d 86; *Unemployment Reserves Comm. v. St. Francis Homes Ass'n*, 58 Cal. App. 2d 71.

Jurisdiction may be raised at any stage of the proceedings. *Matson Navigation Co. v. U. S.*, 284 U. S. 352. In fact, it may be raised for the first time on appeal. *Mott v. Smith*, 16 Cal. 533; *San Diego Savings Bank v. Goodsell*, 137 Cal. 420; *Costa v. Banta*, 98 Cal. App. 2d 181.

Appellees contend that failure expressly to raise the issue of jurisdiction before the state tribunal constitutes a waiver of the right to raise it later. We think the law is well settled to the contrary. See *Mott v. Smith*, *supra*, and companion cases to the same effect heretofore cited.

Where a state court and a federal tribunal may each take jurisdiction of an action, the tribunal first acquiring jurisdiction holds it to the exclusion of the other until its duty is fully performed and its jurisdiction is exhausted. *In re Cohen*, 198 Cal. 221; *Conrad v. West*, 98 Cal. App. 2d 116. Dissatisfaction on the part of litigants with orders and decrees of the court of one jurisdiction should not prompt the courts of another jurisdiction to attempt any interference. *Schuster v. Sup. Ct.*, 98 Cal. App. 619.

In sum, jurisdiction is an issue which is present in every case, whether specially pleaded or not; failure to plead it in this case did not and could not constitute a waiver. The award by the state tribunal was necessarily based upon an implied finding that it had jurisdiction of the case.

II.

THE STATE COMMISSION DID HAVE POWER TO MAKE THE DECISION WHICH IT DID IN THIS CASE.

The fatal injury took place outside of California borders, but it is nevertheless well settled that California has extra-territorial jurisdiction, i.e., jurisdiction to determine the compensation claim of an em-

ployee injured outside the state but hired within its borders. *Quong Ham Wah Co. v. I.A.C. (Ming)*, 184 Cal. 35, 11 A.L.R. 1190; *Alaska Packers Assn. v. I.A.C.*, 1 Cal. 2d 250, 294 U.S. 532. See 23 Cal. Law Review 449.

The decedent was a California resident, working out of California for a private organization, and hired by the latter within California borders. On the basis of these facts, a prima facie showing of jurisdiction had been made, and the California commission properly exercised its jurisdiction when asked to do so.

It is true that such a determination was requested by the claimants, and that no objection thereto was raised by the insurer. The appellees herein contend that the insurer's failure to raise a jurisdictional defense before the commission constitutes a waiver of the right to plead it later. This is indeed a novel contention and one which, it will be noted, is not supported by any citation of authority. As heretofore stated, jurisdiction is an issue that can be raised at any stage of the proceedings, and can never be waived. It is a limitation upon the court, rather than the parties.

By the mere fact of making its findings and award, the state commission exercised its jurisdiction. That determination became final, the award was fully paid, and the endeavor of the federal deputy commissioner to superimpose his authority in such a situation amounts to a collateral attack on the determination by the state tribunal. As we have pointed out in our opening brief (page 18, final paragraph), dictum in

the case of *Mike Hooks, Inc. v. Pena*, 313 F. 2d 696, strongly suggests that the court regarded the prior decision by the state workmen's compensation tribunal as a final determination so far as the employee and the carrier were concerned; however, the controversy was between the employee and his employer in the form of a Jones Act suit against the latter, and was not barred by the compensation award since the *employer* was not a real party to that proceeding.

Here the prior decision by the state tribunal involved a controversy between dependents of the employee and the carrier, this being the very situation in which, as the court intimated, the prior decision should be regarded as binding.

III.

WHILE JURISDICTION OF THE STATE TRIBUNAL CLEARLY APPEARS, THAT OF THE FEDERAL COMMISSION IS MOST QUESTIONABLE.

The learned brief of opposing counsel points to no precedent or previous case which holds that the federal deputy commissioner has ever taken jurisdiction in a case involving similar facts. Surely, with the Defense Bases Act in existence for a quarter of a century, there would have arisen a situation involving a similar controversy, with a resulting decision, to which counsel could point as support for the action of the deputy commissioner herein. We are satisfied, in view of counsel's special knowledge in this field, that

such a decision would be known to him and have been cited, had such there been.

Instead, it has been necessary for appellees' brief to contend, not without difficulty, that this is a claim which should come under the federal act; that it is, in effect, a case of first impression and must be decided purely on its own facts, rather than upon the basis of precedent and familiar principles of law.

We have pointed out in our original brief the fact that it is well settled, under the "Death On The High Seas Act", that "vessel" is a term which includes an airplane. In that statute (46 U.S.C.A. 761), a cause of action is provided for wrongful death against the responsible "vessel, person or corporation". The courts have had no difficulty in determining that an airship is a "vessel", whether it is amphibious or not. *Sierra v. Pan-American World Airways, Inc.*, 107 F. Supp. 519; *Lacey v. Wiggins Airways, Inc.*, 95 F. Supp. 916; *Wyman v. Pan-American World Airways, Inc.*, 43 N.Y.S. 2d 420.

Query: If a flying ship, be it a Constellation or otherwise, is a "vessel" for the purposes of the "Death On The High Seas Act", why is it not a vessel for purposes of the Defense Bases Act and of the Longshoremen's and Harbor Workers' Compensation Act? It is significant that the brief of appellees makes no effort to meet this contention; indeed, it cannot do so, for the point seems well settled. Two of the three cases cited represented decisions of federal courts.

The fact that this particular defense has never been been raised before has been cited by opposing counsel (page 19, lines 1-3). If this is a contention to be given consideration, then we submit that it is fully offset by the equally interesting fact that never before, so far as the opposing brief discloses, has there ever been a precedent for the action taken in this matter by the deputy commissioner. In other words, never has an award been made under the Defense Bases Act in a case involving such a factual situation as we have here. Yet there must have been scores of injuries and deaths involving substantially similar facts.

IV.

THE LACK OF JURISDICTION BY THE DEPUTY COMMISSIONER IS SUPPORTED BY THE LATEST FEDERAL DECISION COVERING THIS SUBJECT.

We have reference to the case of *Texas Employers Insurance Association v. Calbeck*, decided on January 10, 1966 by the United States District Court for the Eastern District of Texas, Beaumont Division. The facts of this case, of which we were made aware through the courtesy of opposing counsel, are as follows:

An award of benefits was made by the Texas Industrial Accident Board for an injury sustained when an employee fell from a vessel under construction into navigable waters. The award was, in effect, affirmed on appeal to the state court of Jefferson County.

Thereafter, the employee filed a claim with the federal deputy commissioner for the same injury and was granted a more extensive award of benefits.

The employer and insurance company filed their petition for injunctive relief and summary judgment on the following grounds:

(1) That the acceptance by the claimant of a state court judgment operated as an "election" so as to preclude recovery under maritime law; and

(2) That judgment in the state court cannot be disturbed or collaterally attacked by an employee through seeking a federal remedy provided by the Longshoremen's Compensation Act, the state judgment being *res judicata*.

The claimant and the deputy commissioner took the position that there is really no conflict between the state and federal remedies; that the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, is exclusive and supreme, and that the employee did not lose his right to have his claim heard under the federal statute regardless of what action or results might have been had in the state tribunal.

The District Court set aside the award by the deputy commissioner as "not in accordance with law"; the injunction was made permanent and the plaintiffs' motion for summary judgment was granted. In reaching that result, the Court said:

"Since the claimant Drake here litigated to final judgment in a forum of his choice, a State District Court in Texas, and that Court deter-

mined that it had jurisdiction, such determination is res judicata and Drake made a binding election of remedies. He is, therefore, estopped from collaterally attacking such final judgment by filing a claim with Deputy Commissioner Calbeck."

It will be contended of course that this decision is distinguishable on the ground that the jurisdictional issue was expressly raised before the state tribunal. It is our position, as set forth rather fully in the first section of this reply brief, that jurisdiction is always an issue, whether specially pleaded or not, and that the award by the state tribunal was necessarily based on an implied finding that it had jurisdiction to make it. If our position is sound, as we believe it to be, then the same result should be reached in this matter as was reached in the *Texas* case.

CONCLUSION

For the foregoing reasons we believe that the decisions of the deputy commissioner and of the District Court were clearly erroneous and should be annulled.

Dated, San Francisco, California,
February 24, 1966.

Respectfully submitted,

HANNA & BROPHY,

By WARREN L. HANNA,

Attorneys for Appellants.

No. 20359

In the
United States Court of Appeals
For the Ninth Circuit

ARNOLD A. SMITH and RACHAEL SMITH, his
wife; and HERBERT SMITH and EVELYN
SMITH, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

FEB 10 1967

Appeal from the United States District Court for the District of Arizona

Honorable WALTER E. CRAIG, District Judge

Appellants' Opening Brief

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No. 20359

In the

United States Court of Appeals

For the Ninth Circuit

ARNOLD A. SMITH and RACHAEL SMITH, his
wife; and HERBERT SMITH and EVELYN
SMITH, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Arizona

Honorable WALTER E. CRAIG, District Judge

Appellants' Opening Brief

Appellants were plaintiffs in the District Court and appellee was the defendant. For convenience and uniformity, the parties will be referred to in this brief as they were in the lower court. The transcript of record will be designated as "T.R." followed by the page number.

JURISDICTION

The District Court took original jurisdiction of this case under the Tucker Act, 28 U.S.C. § 1346 (a) (2), which provides in part as follows:

“§ 1346. United States as defendant

“(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

“(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”

In plaintiffs' Amended Complaint,¹ they alleged that the United States had taken property belonging to them without due process of law and without just compensation, in violation of the Fifth Amendment to the United States Constitution, and/or that the United States breached an implied contract with plaintiffs, damaging plaintiffs in the sum of \$7,470.00. (T.R. 8-11)

Judgment dismissing plaintiffs' Amended Complaint (for failure to state a claim) was entered by the District Court on August 3, 1965, and Notice of Appeal was filed within thirty days thereafter. (T.R. 24, 26, 31) This Court has jurisdiction to review the Judgment of the District Court under the provisions of 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE

This appeal is from the Judgment of the District Court dismissing plaintiffs' Amended Complaint for failure to state a claim upon which relief could be granted. The decision of the District Court with respect to the Amended Complaint (T.R. 20-23) adheres to its earlier decision on the original Complaint (T.R. 5-7) reported as *Smith v. United States*, 243 F. Supp. 222, 15 Am. Fed. Tax R.2d 1262 (D.C. Ariz. 1965).

1. Set forth verbatim in the Appendix to this brief.

In their Amended Complaint plaintiffs allege as follows:

On May 8, 1964, and prior thereto, plaintiffs were the owners of certain real property located in Phoenix, Arizona, consisting of land, a warehouse and office building, which they had leased to Lichty Printing and Business Forms, Inc. for a rental of \$1,350.00 per month or \$45.00 per day (T.R. 9). On May 8, 1964, the defendant, through its agents, employees of the Internal Revenue Service, levied upon and seized the property of plaintiffs' tenant, Lichty Printing and Business Forms, Inc., for non-payment of taxes owed by Lichty to defendant. (T.R. 9-10)

The property thus levied upon and seized was located upon the leased premises and, in effecting the seizure, the employees of the Internal Revenue Service took possession of and occupied the premises by padlocking them. (T.R. 9-10) On that same day, May 8, 1964, plaintiffs advised defendant that plaintiffs were the owners of the premises and demanded possession of the premises from defendant. (T.R. 10) Plaintiffs further advised defendant that they would look to defendant for payment of the rent so long as defendant occupied and used the premises. (T.R. 10) Defendant continued to occupy and use plaintiffs' property for approximately five and one-half months, until October 21, 1964, at which time the property was returned to plaintiffs. (T.R. 10)

At the time of the seizure and taking of the premises by the defendant, the lessee, Lichty Printing and Business Forms, Inc., was in default under its lease in the payment to plaintiffs of rent owed for a number of months. By reason of this default, the plaintiffs were entitled to possession of the leased premises under the provisions of the lease (T.R. 16-17), and also under Section 33-361, Arizona Revised Statutes 1956. (T.R. 9)

Based upon the facts and events recited above, plaintiffs alleged that the defendant became obligated upon a contract implied in fact to pay to plaintiffs the sum of \$7,470.00 as rent for plaintiffs' property during the five and one-half months defendant occupied and used the premises. (T.R. 10) In the alternative, plaintiffs alleged that the defendant, through the acts of its agents, took private property of the plaintiffs for public use without due process of law and just compensation in violation of plaintiffs' rights under the Fifth Amendment to the United States Constitution, and that plaintiffs were thus damaged in the sum of \$7,470.00. (T.R. 10)

Defendant moved to dismiss the Amended Complaint for the reason that it failed to state a claim upon which relief could be granted. (T.R. 12) The motion was granted by decision and order of the District Court entered July 29, 1965. (T.R. 20-23) Judgment of dismissal was entered August 3, 1965 (T.R. 24), and followed by the Notice of Appeal filed August 4, 1965. (T.R. 26)

The question presented to this Court is whether or not the United States is liable to a landlord when it takes, occupies and uses the landlord's premises as a result of seizure of a tenant's property located on the premises by padlocking those premises and occupying and using the premises for storage of the seized property, and when, at the time of seizure, the landlord is entitled to remove the tenant and take possession of the property.

SPECIFICATION OF ERRORS

1. The District Court erred in dismissing plaintiffs' Amended Complaint for the reason that the allegations therein do state a claim upon which relief can be granted upon the theory of contract implied in fact for payment

of rent, as well as upon the theory of a taking of private property for public use without due process of law and just compensation in violation of the Fifth Amendment to the Constitution of the United States.

2. The District Court erred in holding that there is no right to possession of property unless the right has been exercised.

SUMMARY OF ARGUMENT

1. Under plaintiffs' lease, as well as under the law of Arizona, plaintiffs were entitled to possession of their property on May 8, 1964, because their tenant had failed to pay the agreed rent.

2. When, on May 8, 1964, the employees of the Internal Revenue Service padlocked the premises, they deprived plaintiffs of the right to possession.

3. The right to possession of property is not determined by actual possession.

4. When plaintiffs' demand for possession was refused, and the property was occupied by the Internal Revenue Service for five and one-half months, the United States impliedly agreed to pay plaintiffs the rental value of the property, and/or plaintiffs' property was taken without due process of law and just compensation.

5. Plaintiffs' Amended Complaint did state a claim for relief and should be reinstated.

ARGUMENT

I. Plaintiffs' Amended Complaint States a Claim for Relief on the Theory of an Implied Contract for Payment of Rent.

"Where private property is taken by the government for public use, a contract to pay for it will ordinarily be implied, even though the government subsequently denies its liability to make compensation . . ." 91 C.J.S., *United States* § 89b, p. 172.

The foregoing principle of law has been cited in numerous cases. One of the earliest cases involving a temporary taking of property by the federal government is *Johnson v. United States*, 2 Ct. Cl. 391 (1866), in which the United States was held liable for the rental value of land taken for military purposes as though it had occupied the property under an implied lease. In that case the court stated it would assume that at the time of entry upon the premises the property owner was willing to lease and the government was willing to rent the premises at the fair or market value of an annual rent. See also a subsequent decision involving the same parties which adhered to the principle stated in the first decision, *Johnson v. United States*, 4 Ct. Cl. 248 (1868).

In its order of April 6, 1965, dismissing plaintiffs' original Complaint, which was adhered to in its subsequent order of July 29, 1965, the District Court stated that in order to maintain an action based on implied contract under the Tucker Act:

“[T]he action must be based upon a contract implied in fact as distinguished from a contract implied in law, or founded upon equitable principles. *United States v. Minnesota Mutual Investment Co.*, 271 U.S. 212. In order to maintain such an action based upon an implied contract, the facts must indicate some understanding between the parties with regard to the rental of or use of the property in question, although the complete terms of the agreement may not necessarily have been expressed . . .” (T.R. 6) See also 243 F. Supp. at 224.

Plaintiffs alleged that they were owners of the property and entitled to possession thereof at the time defendant padlocked the premises. Plaintiffs demanded possession of the premises and advised defendant that they would look to defendant for payment of rent in the sum of \$45.00

per day so long as defendant occupied the premises. In response, defendant continued to use and occupy the premises for approximately five and one-half months. It is submitted that the conduct of the parties imply in fact the existence of an agreement to pay rent for the use of plaintiffs' premises.

The facts in *Hirsch v. United States*, 120 F. Supp. 808 (D.C.E.D.N.Y. 1954) are quite similar to the case at hand. In that case the plaintiffs as owners of rented premises brought an action under the Tucker Act (Title 28, U.S.C. § 1346(a)(2)), alleging that the District Director of Internal Revenue took possession of their premises by levying upon and seizing property belonging to the plaintiffs' tenant, who was a delinquent taxpayer. After taking possession of the premises, the government occupied them for a period of time. The plaintiffs alleged in their complaint that an implied contract arose between them and the District Director for the use and occupation of the premises. As in this case the defendant, prior to answer, moved to dismiss plaintiffs' complaint. In denying defendant's motion the court said:

"I do not believe that these contentions are well founded. Section 1346(a)(2) of Title 28 specifically permits suits against the Government on an implied contract with the United States. The amended complaint alleges an implied contract between the plaintiffs and the District Director arising out of his use and occupancy of the plaintiffs' property for the period in question. In my opinion the cause of action asserted in the amended complaint is such a claim as was contemplated by section 1346(a)(2) of Title 28, U.S.C." 120 F. Supp. at 809.²

2. It should be noted that in a subsequent opinion in this case, *Hirsch v. United States*, 170 F. Supp. 229 (D.C.E.D.N.Y. 1959), which was written by a different district judge, the court held contrary to plaintiffs' position on the merits.

A very recent decision in which the facts are almost identical to this case is *Maryland National Bank v. United States*, 227 F. Supp. 504 (D.C. Md. 1964). In that case a lease between the lessee-taxpayer and the plaintiffs-landlords was in effect when the assets of the taxpayer were seized and the premises padlocked and notices of government seizure were placed on the outside of the building by agents of the Internal Revenue Service. Plaintiffs notified the District Director that they would hold the United States accountable for any rent for the premises which accrued while the government occupied them. Plaintiffs then brought suit under the Tucker Act for damages for the government's occupancy, alleging express contract, implied contract and a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The court did not discuss the ground of express contract since it found for the plaintiffs on the basis of the other theories. After discussing the difference between contracts implied in law and those implied in fact, the court said:

"It is clear from the evidence that the plaintiffs did not dispute the government's seizure of the premises. But, they did make it known that they would look to the United States for any unpaid rent which accrued while the property was under government control. *The intent on the part of the plaintiffs to obligate the premises and to place an obligation on the government is clear.*

* * * * *

"*The intent of the government to obligate itself may be implied from other provisions of the regulations.* Feldwin Realty Co. v. United States, 169 F. Supp. 73 (D.N.J. 1959) commented upon in 9 Mertens, Law of Federal Income Taxation, § 49.191 (1963 Supp.). These

regulations provide that the United States shall pay for the expenses of the levy from the proceeds of the sale. Certainly, rentals for storage space for property seized is a bona fide expense of the levy.

"The court therefore finds an intent on the part of both parties to obligate themselves, and a contractual relationship, implied in fact, between them." (Emphasis added) 227 F. Supp. at 507-08.

The government's conduct in this case, in the face of plaintiffs' demand either for possession of their property or the payment of rent, clearly gives rise to the implication that the government agreed to pay rent.

II. Plaintiffs' Amended Complaint States a Claim for Relief on the Theory of Inverse Condemnation or a Taking of Private Property Without Due Process of Law and Just Compensation.

While many courts use the vehicle of implied contract to find liability on the part of the government and assess damages for the temporary taking of private property and treat it as a separate legal theory, it is clear that the ultimate basis for liability is the prohibition against the taking of private property without just compensation found in the Fifth Amendment to the Constitution of the United States.

In *Etheridge v. United States*, 218 F. Supp. 809 (D.C. E.D.N.C. 1963), the court held that:

"When the United States occupies the premises of another it becomes liable for the rental value even though the property is occupied without any intention on the part of the United States to pay rent. In *Niagara Falls Bridge Commission v. United States*, 76 F. Supp. 1018, 1019 (111 Ct. Cl. 338, 1948) and cases cited, the Court said, 'This liability arises under the Fifth Amendment prohibiting the taking of private property without the payment of just compensation.'" 218 F. Supp. at 813.

The facts alleged in plaintiffs' Amended Complaint establish an "inverse or reverse condemnation" as that term has been defined by this Court in *State of California v. United States District Court*, 213 F.2d 818 (9th Cir. 1954):

"The term 'inverse or reverse condemnation' contemplates the situation in which property has been taken by the exercise of the power of eminent domain, but without any payment of compensation therefor having been made. The theory upon which such an action is brought is that since a taking, which is otherwise lawful, would be a violation of due process of law if done without compensation, it must be presumed that the taker intends to pay for the property condemned. See *Peckwith v. Lavezzola*, 1942, 50 Cal.App.2d 211, 122 P.2d 678, 682 . . ." 213 F.2d at 821, n. 10.

In *Maryland National Bank v. United States*, *supra*, 227 F. Supp. 504, in which, as previously pointed out, the facts are almost identical to the facts in this case, after allowing the landlord to recover on the implied contract theory, the court further decided that the landlord could also recover for a taking of property in violation of the Fifth Amendment. In quoting the United States Supreme Court, the decision states:

"It is apparent that even had the argument of implied-in-fact contract failed, a further ground for recovery under the Tucker Act, namely a taking of property without due process of law in violation of the fifth amendment to the Constitution, avails itself to the plaintiffs. As was said by Mr. Justice Frankfurter in *United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 1384, 91 L.Ed. 1789, 1793 (1947):

"But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution,

or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation."

"The United States argues that no taking of property existed here and that no demand was made upon it to release the premises. The Dickinson case, 331 U.S. at page 748, 67 S.Ct. at page 1385, 91 L.Ed. 1789, said:

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

"The government put its lock on the premises and placed notices on the outer walls telling of the seizure. These facts convince the court that a taking took place [see *Feldwin Realty Co. v. United States*, supra, 169 F. Supp., p. 77], notwithstanding the lack of demand by the plaintiffs to vacate or the possibility that the government would have vacated upon request." 227 F. Supp. at 508.

It should be noted that in this case plaintiffs demanded that defendant vacate the premises and defendant refused.

In *Feldwin Realty Co. v. United States*, 169 F. Supp. 73 (D.C.N.J. 1959), adhered to on rehearing, 179 F. Supp. 70 (D.C.N.J. 1959), the court held that where the government levied on property of a tenant of a landowner and stored property on the owner's premises and padlocked the same, there arose in favor of the landowner against the government an action based upon implied contract and an action based upon the constitutional provision that private property shall not be taken for public use without just compensation.

In *United States v. Caruso*, 3 Am. Fed. Tax R. 2d 515 (D.C.W.D. Pa. 1958), the court stated that since the tenant's property held under distraint by the government was stored on the landlord's premises, the landlord should be compensated for use of her premises and the court awarded a sum for this rental and ordered it paid as a part of the costs of the sale.

In *Carroll v. United States*, 229 F. Supp. 891 (D.C.W.D. Ark. 1964), where the plaintiff sued for reasonable value for use of premises, the court held that where the United States, on the basis of a Small Business Administration mortgage on lessee's cafeteria equipment which had been abandoned by lessee's bankruptcy trustee, had exclusive dominion and control of such equipment but did not remove it, lessors were deprived of their property and the United States was liable on implied contract for reasonable rental. See also *Buffalo & Fort Erie Public Bridge Authority v. United States*, 65 F. Supp. 476, 106 Ct. Cl. 731 (1946), and *Niagara Falls Bridge Commission v. United States*, 76 F. Supp. 1018, 111 Ct. Cl. 338 (1948).

In its orders of April 6, 1965, and July 29, 1965, the District Court held that since plaintiffs had not *exercised* their right to possession of the property, and the tenant was still in possession at the time of seizure by the government, there was no taking of property from plaintiffs. (T.R. 7, 22-23)

It would appear that the District Court confused actual possession with the right to possession. In 2 Nichols, *Eminent Domain* § 5.22[2], p. 46, it is stated that:

"Possession is not necessary to the maintenance of proceeding to enforce the constitutional right of compensation for the taking of property by eminent domain, and when the premises taken are in the possession of tenants for life or years, the remainderman or rever-

sioner must be compensated for the destruction of his interest . . .” (See also *Alexander v. United States*, 39 Ct. Cl. 383 (1904); *Stubbs v. United States*, 21 F. Supp. 1007 (D.C.M.D.N.C. 1938); and other numerous authorities cited in the footnotes to the above quotation.)

The tenant, Lichty Printing and Business Forms, Inc., was in arrears in the payment of rent on the date of the seizure and taking of the premises and therefore under both the default clause of the lease and state law the plaintiffs had the *right to enter and take possession of the premises*. The pertinent portion of the lease between plaintiffs and their tenant provides:

“DEFAULT: It is specifically understood and agreed that should the lessee fail to pay any installments of rent herein agreed to be paid, . . . the lessors may, at their option, declare this lease to an end, and cancel the same, and enter and take possession of the premises, . . .” (T.R. 16-17)

Section 33-361, Arizona Revised Statutes 1956, provides in part:

“A. When a tenant neglects or refuses to pay rent when due and in arrears for five days, or when tenant violates any provision of the lease, the landlord or person to whom the rent is due, or his agent, may re-enter and take possession, . . .”

Plaintiffs concede that they had as yet taken no steps to dispossess their tenant and actually take possession prior to the levy and seizure by the United States. This did not alter the fact that plaintiffs had the right to retake possession of their property at any time. Lichty Printing was a tenant by sufferance and did not own any interest in the property. 2 Nichols, *Eminent Domain*, § 5.23[6], p. 73. How-

ever, once the defendant had levied upon and seized the tenant's property and padlocked the premises, thereby also seizing and taking the premises, plaintiffs' right to re-enter and take possession of the premises had been terminated. Plaintiffs could not break the government's padlock and enter and take possession of the premises without incurring both civil and criminal liability.

If, as the District Court held (T.R. 23), the defendant took only what the tenant was entitled to under the law, then the defendant took only the right to possession at the sufferance of plaintiffs. This right ended when plaintiffs demanded possession of their property. If the reasoning of the District Court were carried to its logical conclusion, plaintiffs would have no right to compensation if Lichty Printing had been a trespasser, because the trespasser was in actual possession of the property. Clearly, this would be erroneous. The mere fact that the right to possession of property is as yet unexercised does not preclude its existence.

There can be no doubt that a temporary taking of property entitles the owner to just compensation. As the late Justice Frankfurter stated in *United States v. Dickinson*, 331 U.S. 745, 67 Sup. Ct. 1382, 91 L.Ed. 1789 (1947):

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time . . ."
331 U.S. at 748.

In *Dickinson* the Supreme Court held that a taking had occurred and allowed the plaintiffs to recover just compensation for land intermittently flooded by waters impounded by a dam constructed by the United States and for erosion caused by such waters.

In *United States v. General Motors Corp.*, 323 U.S. 373, 65 Sup.Ct. 357, 89 L.Ed. 311 (1945), the Supreme Court discussed the taking of a temporary occupancy from a long-term lessee of premises and held that the just compensation to be paid is the value of the interest taken. In that case the occupancy taken by the United States was originally one year. In the case at hand, the occupancy taken by the United States was five and one-half months. The elements and measure of damages as just compensation for temporary use and occupancy are discussed at length in *Annot.*, 7 A.L.R.2d 1297.

In 2 Nichols, *Eminent Domain* § 6.1[1], pp. 367-372, taking of property is discussed as follows:

“It is well settled that a taking of property within the meaning of the constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation.”

Defendant lawfully levied upon and seized property belonging to the delinquent taxpayer, Lichty Printing and Business Forms, Inc., who was plaintiffs' tenant. But the federal government cannot be allowed to seize that property on rented premises and thereafter occupy and use the landlord's premises without paying for them. This action deprives the landlord of his property. He is deprived of his right to enter and take possession of the premises and rent the premises to someone else or to otherwise use them as he wishes. Such action on the part of the United States is in direct violation of the prohibition of the Fifth Amendment to the Constitution of the United States:

“... nor shall any person ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.”

CONCLUSION

The law is clear that when the United States, through the acts of its agents in performing their official duties, occupies and uses private property or interferes with the owner's use and enjoyment of his property, it becomes liable to the owner. This liability on the part of the United States may be based either upon the theory of implied contract for payment of rent or the theory that there was a taking of private property under the Fifth Amendment to the United States Constitution, but under either theory the liability of the United States is ultimately based upon the constitutional prohibition that private property shall not be taken for public use without just compensation.

The truth of the well pleaded facts in plaintiffs' Amended Complaint was conceded for the purpose of defendant's motion to dismiss. *Interstate Nat. Gas. Co. v. Southern California Gas Co.*, 209 F.2d 380 (9th Cir. 1953). The facts pleaded establish that defendant took, occupied and used plaintiffs' premises for approximately five and one-half months, thereby depriving plaintiffs of the use and enjoyment of their premises, for which plaintiffs are entitled to compensation.

In *Conley v. Gibson*, 355 U.S. 41, 78 Sup.Ct. 99, 2 L.Ed. 2d 80 (1957), a unanimous Supreme Court speaking through Justice Black said:

“In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” 355 U.S. at 46-47.

In view of the foregoing, plaintiffs urge that the District Court erred in granting appellee's motion to dismiss, that the judgment should be reversed and that plaintiffs' Amended Complaint should be reinstated.

Respectfully submitted,

JARRIL F. KAPLAN
CURTIS A. JENNINGS
MOORE, ROMLEY, KAPLAN,
ROBBINS & GREEN

Attorneys for Appellants

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JARRIL F. KAPLAN

Attorney for Appellants

(Appendix Follows)

Appendix

*In the United States District Court
for the District of Arizona*

NO. CIV-5359-PHX

ARNOLD A. SMITH and RACHAEL SMITH, his
wife, and HERBERT SMITH and EVELYN
SMITH, his wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

For their claim against defendant, plaintiffs allege:

I.

This is an action for the recovery of \$7,470.00 due to plaintiffs from defendant for the taking, use and occupancy of real property owned by plaintiffs and is brought under Title 28, United States Code, § 1346(a)(2).

II.

Plaintiffs now are, and for many years heretofore, have been residents and citizens of Phoenix, in Maricopa County, Arizona, within the territorial jurisdiction of this Court.

III.

Plaintiffs have a claim against the United States for compensation for value of property taken by the United States for public use, as hereinafter more particularly stated.

IV.

During May, 1964, and before and after that time, plaintiffs were, had been and still are the owners of real property consisting of land, a warehouse and office buildings located along the northeasterly portion of Lot 7, Block 4, Homestead Place, commonly known as 922 North 17th Avenue, Phoenix, Arizona, and situated in the City of Phoenix, County of Maricopa, State of Arizona.

V.

Until May 8, 1964, and prior thereto, plaintiffs had leased the premises described in paragraph IV above to Lichty Printing and Business Forms, Inc., an Arizona corporation, for rental of \$1,350.00 per month or \$45.00 per day. The lessee, Lichty Printing and Business Forms, Inc., was in default under said lease in the payment to plaintiffs of the rent owed for the premises for a number of months and, in May, 1964, there was considerable back rent due and owing by lessee to plaintiffs. By reason of such default, plaintiffs, on May 8, 1964, and thereafter, were entitled to possession of said premises under the provisions of the aforesaid lease and also under Section 33-361, Arizona Revised Statutes (1956).

VI.

On May 8, 1964, the defendant United States of America, through its agents, employees of the Internal Revenue Service, took possession of and occupied the premises de-

scribed above by padlocking the said premises and levying upon and seizing property of the lessee, Lichty Printing and Business Forms, Inc., situated on the leased premises, for taxes owed by lessee to defendant. On the same date, the plaintiffs demanded possession of the premises from defendant and advised defendant that plaintiffs were the owners of the premises and that plaintiffs would look to defendant for payment of the rent in the sum of \$45.00 per day so long as defendant occupied and used said premises. Defendant continued to occupy and use plaintiffs' premises until October 21, 1964, at which time the said premises were returned to plaintiffs.

VII.

By its use and occupancy of plaintiffs' premises, the defendant United States of America became obligated to pay to the plaintiffs the sum of \$7,470.00 as rent for said use and occupancy from May 8, 1964, to October 21, 1964. No part of said sum has been paid.

VIII.

In the alternative, plaintiffs allege that defendant, through the acts of its agents, took private property of the plaintiffs for public use without due process of law and just compensation in violation of plaintiffs' rights under the United States Constitution, Amendment V, in that defendant deprived plaintiffs of their right to re-enter their premises, dispossess the tenant and take possession of their premises; that said taking and use commenced May 8, 1964, and lasted until October 21, 1964; and that plaintiffs have been damaged thereby in the sum of \$7,470.00.

WHEREFORE, plaintiffs pray judgment against the defendant in the sum of \$7,470.00 and for plaintiffs' costs of suit incurred herein.

MOORE, ROMLEY, KAPLAN, ROBBINS
& GREEN

By /s/ CURTIS A. JENNINGS
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Phoenix, Arizona

IN THE
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For the Ninth Circuit

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v. Appellants

UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF AND APPENDIX FOR THE APPELLEE

RICHARD M. ROBERTS,
Acting Assistant Attorney General

LEE A. JACKSON,
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FEB 10 1967

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JURISDICTION

This appeal involves a claim against the United States for the rental value of leased premises. The appellants brought this action on December 7, 1964 (R. 1-3), alleging jurisdiction in the District Court under

28 U.S.C., Section 1346(a) (2). On April 7, 1965, the District Court granted the Government's motion under Rule 12(b) (6), Federal Rules of Civil Procedure, (R. 4) to dismiss the complaint for failure to state a claim upon which relief can be granted (R. 5-7, 31). An amended complaint was filed on April 13, 1965, alleging jurisdiction under 28 U.S.C., Section 1346(a) (2). (R. 8-11). The judgement of the District Court dismissing the amended complaint for the failure to state a claim upon which relief could be granted was entered on August 3, 1965. (R. 24). Within sixty days thereafter, on August 4, 1965, a notice of appeal was filed. (R. 26). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court was correct in dismissing for failure to state a claim the landlord-appellants' complaint against the United States seeking the rental value of leased premises where the United States had seized the property of the tenant-taxpayer in possession of the leased premises for the nonpayment of taxes.

CONSTITUTION AND STATUTES INVOLVED

These may be found in the Appendix, *infra*.

STATEMENT

The appellants' original complaint alleged that during and prior to May, 1964, the appellants were the owners of certain real property located in Phoenix, Arizona. Prior to May 8, 1964, the appellants leased the real property, consisting of land, a warehouse and office building, to Lichty Printing and Business Forms, Inc., for rental of \$1,350 per month, or \$45 per day. In May of 1964 the tenant was in arrears and owed back rent for a number of months. (R. 2.)

On May 8, 1964, the Government, through its agent, the Internal Revenue Service, took possession of the

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On May 8, 1964, the Government, through its agent, the Internal Revenue Service, took possession of the

premises and padlocked the premises in order to levy upon and seize the property of the tenant-taxpayer for taxes owed by the tenant-taxpayer. (R. 2.) On the same date the appellants advised the Government that they were the owners of the premises and would look to the Government for rent in the sum of \$45 per day so long as the Government occupied and used the premises. (R. 2-3.) On October 21, 1964, the Government relinquished possession of the premises. (R. 3.)

Based upon the above facts the appellants contended under two related theories that they were entitled to rent from the United States for the period during which the Government occupied the leased premises. First, they contended that the Government was liable upon an implied contract to pay rent of \$45 a day. In the alternative, they contended that the Government was liable in damages at the rate of \$45 a day for the taking of their private property for public use without just compensation. (R. 3.)

The Government moved to dismiss the original complaint for the failure to state a claim upon which relief can be granted. (R. 4.) The District Court granted the motion to dismiss (R. 5-7), holding that an action against the Government under an implied contract must be based upon a contract implied in fact and that the continued occupation by the Government after the Government was informed that the appellants would look to it for rent "did not in itself support a finding of an implied contract between plaintiffs and defendant" (R. 6.). The District Court further held that there was no taking of any property of the appellants because (R. 7) —

At the time of the occupancy by the defendant the only party in possession and having a right to possession was the tenant, Lichty. Thus, in effect, defendant intending only to seize the property of the tenant, Lichty, could not be said to have seized the property of the plaintiffs.

The appellants thereafter filed an amended complaint (R. 8-11) containing only three added allegations. The appellants alleged that, because the tenant was in arrears on his payment of rent, the lease provisions (R. 16-17) and Section 33-361, 11 Arizona Revised Statutes Annotated (1956), gave the appellants the right to regain possession of the premises (R. 9). The appellants also alleged that on the date of the Government's seizure of the tenant's property the appellants demanded possession from the Government (R. 10), in addition to advising the Government that they would look to the Government for rent. Lastly, the appellants elaborated the alleged taking and alleged that the Government deprived the appellants "of their right to reenter the premises, dispossess the tenant and take possession of the premises." (R. 10.)

The Government moved to dismiss the amended complaint (R. 12) and attached a copy of the lease between the appellants and their tenant Lichty Printing (R. 13-19) to the motion. The District Court granted the motion to dismiss, holding that (R. 22-23) —

In viewing the amended complaint in the light most favorable to the plaintiffs, it does not appear therefrom that at the time of the taking, or thereafter, plaintiffs had any right to the possession of the premises as against the tenant, Lichty. This, because it does not appear from the pleadings that the plaintiffs exercised any of their rights against the tenant, Lichty, which would place the possession of the premises in the plaintiffs. The defendant, therefore, seized only the property of the tenant, Lichty, which it was entitled to do under the law.

The appellants have appealed to this Court from the judgment below. (R. 26.)

SUMMARY OF ARGUMENT

The appellants, as landlords, are seeking recovery against the United States for the rental value of their leased premises. The appellants had leased their premises for a term of fifteen years to Lichty Printing. On May 8, 1964, the Government seized the personal property of the tenant-taxpayer situated on the leased premises for the nonpayment of federal taxes and padlocked the premises to effectuate the seizure. The appellants sought recovery on grounds of both an implied contract by the Government to pay rent and a taking of private property for public use without just compensation.

The tenant owed the appellants a considerable amount of back rent at the time of the seizure of the tenant's property. However, the appellants concededly had not then exercised their rights under the lease or under the Arizona statutes to terminate the lease for the nonpayment of rent. Moreover, the appellants did not allege any attempt to terminate the lease thereafter while the premises were padlocked. Thus, during the entire period in question, the tenant, not the appellants, had the right to possession of the premises. Therefore, the Government did not interfere with either the possession or right to possession of the landlord-appellants, for until they took action to terminate the lease the appellants did not have the right to possession of the premises. Thus, there was no taking by the Government of any property of the landlord-appellants.

The landlord-appellants had a simple remedy at hand. So long as the landlords did not exercise their right to terminate the lease, they cannot convert the Government, as a creditor levying upon tax-liened

property on the leased premises, into a tenant. There was no actual agreement, either express or implied-in-fact, on the part of the United States to pay rent to the appellants.

Therefore, the District Court correctly dismissed the amended complaint for failure to state a claim upon which relief could be granted.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE UNITED STATES WAS NOT LIABLE FOR ANY RENT, SINCE IT SEIZED ONLY THE TENANT-TAXPAYER'S RIGHT TO POSSESSION UNDER A CONTINUING LEASE WHICH WAS NOT TERMINATED BY THE LANDLORDS AND DID NOT ITSELF AGREE TO PAY THE RENT DUE FROM THE TENANT OR SEIZE ANY PROPERTY OF THE LANDLORDS.

A. The United States seized only the possession of the taxpayer-tenant under a continuing lease.

The issue presented in this case is a narrow one. Described by the appellants themselves (Br. 4), it is whether the United States can be held liable for rent when it uses the leased premises for the storage of personal property of a tax delinquent tenant seized on the premises when the landlord, although entitled to terminate the lease, remove the tenant and take possession of the premises, does not in fact do so, but merely gives notice to the United States demanding possession or rent. The cases are clear enough that the landlords cannot by this procedure convert the United States into a tenant or claim that their property was taken for public use. The United States did not take possession from the landlords, but from the tenant. It did

not seize the landlords' reversion, but the tenant's possession.

The appellants had at hand a simple remedy under state law (Section 33-361, 11 Arizona Revised Statutes Annotated (1956), Appendix *infra*) and under the lease provisions (R. 16-17) whereby they could have quickly terminated the lease and secured possession from the tenant. The appellants concede that they did not exercise their rights to recover possession of the premises before the Government seized their tenant's personal property. (Br. 13.) Nor did the appellants allege that they took any action thereafter during the period in question to terminate the lease with their tenant and regain possession of the premises. (R. 22-23.) The landlords cannot keep the lease in existence and seek to hold the United States for using the tenant's leasehold rights in order to store property on the premises belonging to the tenant which had been seized for a tax debt.

The decision below rests on clear and practical sense, affording the landlords the right to compel the United States either to remove the seized property from the premises or pay rent by a simple exercise of their right to terminate the lease. The landlords cannot secure from the Government rent due from a tenant who is in default to them for rent and to the United States for taxes, just because the United States is enforcing its creditor's rights in the tenant's property located on the leased premises. The appellants' brief nakedly argues that they should collect rent from the United States simply because they were entitled to terminate the lease and secure possession, even though in fact they did not do so.

The decided cases give ample support to the decision below. *Hirsch v. United States*, 170 F. Supp. 229 (E.D.

N.Y.), and *Roxfort Holding Co. v. United States*, 176 F. Supp. 587 (N.J.), are directly in point and in accord with the decision below. The cases relied upon by the appellants are distinguishable since, unlike the case at bar, they involved cases either where the lease was terminated (*Feldwin Realty Co. v. United States*, 169 F. Supp. 73 (N.J.); *United States v. Caruso* (W.D. Pa.), decided December 31, 1958 (3 A.F.T.R. 2d 515); *Carroll v. United States*, 229 F. Supp. 891 (W.D. Ark.)), where there was an express agreement on the part of the United States to pay rent for a prior period (*Maryland National Bank v. United States*, 227 F. Supp. 504 (Md.)), or where the United States seized possession of the premises directly from the owner with no leasehold interest whatever being involved (*Johnson v. United States*, 2 Ct. Cl. 391; *Buffalo & Fort Erie Public Bridge Au. v. United States*, 65 F. Supp. 476 (Ct. Cl.); *Niagara Falls Bridge Commission v. United States*, 76 F. Supp. 1018 (Ct. Cl.); *Etheridge v. United States*, 218 F. Supp. 809 (E.D. N.C.)).

For the purposes of the Government's motion to dismiss all of the well-pleaded facts are admitted as true, while conclusions of law or unsupported deductions of fact are not admitted. *Ott v. Home Savings & Loan Assn.*, 265 F. 2d 643, 648 (C.A. 9th); *Interstate Nat. Gas Co. v. Southern California Gas Co.*, 209 F. 2d 380, 384 (C.A. 9th); 2 Moore's Federal Practice Second ed.), par. 12.08. The appellants, under the admitted facts, had no right to the possession of the premises absent some action to terminate their lease with the tenant, and hence can prove no set of facts in support of their claim which would entitle them to relief. See *Conley v. Gibson*, 355 U.S. 41, 46-47.

B. *There was no actual agreement by the United States to pay rent to the appellants for the premises.*

The Tucker Act¹ allows recovery against the United States "upon any express or implied contract." 28 U.S.C., Section 1346(a)(2), Appendix, *infra*. As the Supreme Court said in *United States v. Minn. Investment Co.*, 271 U.S. 212, 217 —

An implied contract in order to give the Court of Claims or a district court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law.

Hence the appellants must show an express or implicit agreement by the United States which was breached, for a contract implied in fact is an actual contract based on the mutual agreement of the parties. *Alabama v. United States*, 282 U.S. 502, 506; *First National Bank of Emlenton, Pa. v. United States*, 265 F. 2d 297, 300 (C.A. 3d). The distinction between contracts implied in law and those implied in fact is set out in 1 Williston on Contracts (Third Ed., 1957), Section 3:

The expression "implied contract" has given rise to great confusion in the law.* * * Some of these rights [enforced by contractual actions], however, were created, not by any promise or mutual assent of the parties, but were imposed by law on the defendant irrespective of, and sometimes in violation of, his intention. Such obligations were called implied contracts. Another name is that now generally in use of "quasi contracts." This expression makes clear that the obligations in question are not true contracts, and it also avoids confusion with another class of obligations which have also been called implied contracts. This latter class consists of obligations arising from mutual agreement and intent to promise but where the agreement and promise have

¹ Sections 1 and 2 of the Act of March 3, 1887, c. 359, 24 Stat. 505, popularly known as the Tucker Act, were statutory forerunner of 28 U.S.C., Section 1346 (a) (2).

not been expressed in words. Such transactions are true contracts and have sometimes been called contracts implied in fact.

The appellants have not alleged any facts which would give rise to an inference of any actual agreement by the Government to pay rent to them as landlords. Rather, their claim is based solely on the Government's continued occupation after demand by the appellants for possession or rent so long as the Government occupied the premises. (Br. 6-7.) As the District Court below held (R. 6), "The fact that the Internal Revenue Service continued to occupy the premises thereafter did not in itself support a finding of an implied contract between plaintiffs and defendant to pay rental for the premises occupied by defendant." There was no manifestation by the Government of any intention to promise to pay rent to the appellants. As the court said in *Hirsch v. United States*, *supra*, p. 232 —

An agreement for the use and occupation is not implied by the mere showing of occupation of the premises, without proof of some circumstances authorizing an inference that the parties intended to assume the relationship of landlord and tenant toward each other, * * *

The appellants were in a landlord and tenant relationship during the time period involved with Lichty Printing as the tenant under the lease.

Some cases have allowed a recovery against the Government under a theory of implied contract where there has been a taking of private property for public use without just compensation. *Johnson v. United States*, 2 Ct. Cl. 391; *Buffalo & Fort Erie Public Bridge Au. v. United States*, 65 F. Supp. 476, 486 (Ct. Cl.); *Niagara Falls Bridge Commission v. United States*, 76 F. Supp. 1018 (Ct. Cl.); *Etheridge v. United States*, 218 F. Supp. 809, 813 (E.D. N.C.). In all of these cases the Govern-

ment took possession of the premises from the owners, with no leasehold interest being involved. The theory of recovery is based on the legal doctrine that the sovereign can do no wrong, and hence has impliedly agreed to pay for the use under the taking. *Johnson v. United States*, *supra*, p. 415; *Alexander v. United States*, 39 Ct. Cl. 383, 393. See *State of California v. United States District Court*, 213 F. 2d 818, 821, where this Court questioned this theory of recovery. The appellants concede that they are contending for this type of implied contract, which is based solely upon a taking of their property by the Government. (Br. 9.) The Supreme Court said in *United States v. Dickinson*, 331 U.S. 745 (p. 748):

But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation."

Hence, such a theory of recovery is possible only where there is a taking of private property without just compensation.

C. *The United States did not take any property of the appellants.*

At the time the Government seized the property of the delinquent tenant, Lichty Printing, the appellants had taken no steps to dispossess their tenant. (App. Br. 13.) The tenant then owed back rent for a number of months. (R. 9.) Under the fifteen-year lease (R. 13) the appellants had the right to cancel the lease and retake possession for the failure to pay rent, or the appellants could at their option continue the lease in

force and sue for back rent (R. 16-17). The appellants also had the right under Arizona law to recover possession for the nonpayment of rent by re-entry or by a summary action for recovery of possession. Section 33-361, 11 Arizona Revised Statutes Annotated (1956).

Again, the appellants at no time after May 8, 1964, the date of the seizure, exercised any of their rights against their tenant to regain the right to possession. (R. 22.) The appellants did not declare the lease to an end and cancel it under their lease right (R. 16-17); nor did the appellants bring summary proceedings to recover possession, even though the Arizona statute is clear that after a lease is terminated an action is available to the landlord against someone holding under the tenant (Section 12-1171(3), 4 Arizona Revised Statutes Annotated (1956), Appendix, *infra*). Thus, during the entire time period in question the tenant had the right to the possession of the premises under the lease. So long as the tenant retained the right to possession of the premises under the lease the appellants were in no position to demand the premises from the Government, for the appellants were not then entitled to possession of the premises.

The tenant, Lichty Printing, was in possession under a fifteen-year lease (R. 13), and was not a tenant by sufferance (App. Br. 13). A tenant by sufferance is a former tenant who holds over after the termination of his estate without the consent of the landlord. 1 American Law of Property (Casner ed., 1952), Sec. 3.32. As shown above, the appellants did not exercise any of their rights against the tenant to terminate the lease. (R. 22-23.) Therefore, the tenant cannot be said to be holding over after termination of its lease.

The appellants, although not in possession, retained the landlord's reversionary interest in the premises.

1 American Law of Property (Casner ed., 1952), Section 3.59. Therefore, they would be entitled to recover only for any taking that injured their reversionary interest. 2 Nichols, Eminent Domain (Third ed., 1963), Sec. 5.23, pp 58-61. See *Alexander v. United States*, 39 Ct. Cl. 383.² However, the temporary occupation of the premises by the Government to store the seized goods did not infringe on the landlord's reversionary interest where, as here, the appellants at no time took any action to recover the right to possession from their tenant. *Hirsch v. United States*, *supra*, p. 232; *Roxfort Holding Co. v. United States*, *supra*, p. 588. By not terminating the lease, the appellants retained throughout the time period involved the right to recover rent from their tenant, Lichty Printing.³ Any recovery for a temporary taking that does not injure the landlord's reversionary interest inheres in the tenant alone. 2 Nichols, Eminent Domain, *supra*, Sec. 5.23. See *United States v. General Motors Corp.*, 323 U.S. 373; *Alexander v. United States*, *supra*.

The decided cases support the Government's contention that no taking occurred under the facts as alleged. *Hirsch v. United States*, 170 F. Supp. 229 (E.D. N.Y.), involved nearly identical and undisputed facts. A landlord was there claiming the rental value of premises occupied by the Internal Revenue Service to store the tenant's seized property. There, too, the landlord at no time acted to retake the right to possession from the tenant. The District Court said (p. 232):

2 In *Alexander*, the Government temporarily occupied leased farm land during a typhoid epidemic and caused considerable damage to the land. The landlord was allowed to recover for the damage to its reversionary interest in the land, but was not entitled to any rental value for the time occupied. Rather, the tenant alone recovered for the temporary taking of its right to possession.

3 Indeed, under the lease the tenant also agreed to indemnify the landlords for any loss or expense caused the landlords by the placing of a lien on the premises. (R. 15)

In summary, it appears that the defendant did not interfere with or take possession of the premises from the plaintiffs during the subject period of time for the simple reason that the plaintiffs were not in possession thereof. The tenant Geiger was in possession. The padlocking by the defendant violated no right of the plaintiffs. The plaintiffs were at liberty to oust the tenant and, incidentally its personal property, if they so elected. * * *

Appellants' reliance upon the first *Hirsch* decision (*Hirsch v. United States*, 120 F. Supp. 808 (E.D. N.Y.)), is misplaced. The first decision denied the Government's motion to dismiss where the landlord alleged that he had dispossessed the tenant. When it developed at the trial that he had not dispossessed the tenant, the trial court, consistently with the first decision, held that the landlord could not collect rent from the Government. Here, the appellants did not allege in their original complaint or in their amended complaint that they took any action to terminate their tenant's lease.

In *Feldwin Realty Co. v. United States*, 169 F. Supp. 73 (N.J.), the Government seized the property of a former tenant (a fact which appellants' brief does not mention (cf. p. 11)) situated on the landlord's property. The District Court allowed recovery and distinguished the *Hirsch* case on the grounds that (p. 76) in *Hirsch* the —

landlord did not have any present right to the property seized; hence he could not claim that the Government seized his property. Therefore *Hirsch* has no bearing on the facts presented in this case.⁴

4 Recognizing that a landlord has the right to terminate the lease and regain possession, the Internal Revenue Service's internal administrative provisions (described in *Feldwin Realty*, *supra*, pp. 74-75) authorize revenue officers to enter into an agreement with the landlord to pay rent for the storage of levied property on the premises, even though the landlord has not yet exercised his rights to regain possession. However, where, as here, no agreement has been reached, the landlord must exercise his readily available rights to regain possession from the tenant before acquiring any claim against the Government for the leased premises.

In *Roxfort Holding Co. v. United States*, 176 F. Supp. 587 (N.J.), the same District Court that decided *Feldwin Realty Co.* was presented with a case where there was no action by the landlord to oust the tenant. The court followed *Hirsch* and did not allow any recovery against the United States. It said (pp. 588-589):

There was no taking or interference with any property rights of the plaintiff-landlord which would warrant the award of compensation under the Fifth Amendment of the Constitution. In this respect, our case differs from *Feldwin Realty Co. v. United States*, D.C.D.N.J. 1959, 169 F. Supp. 73. There the Government levied upon the personality of a *former* tenant and thus interfered with the possessory rights of the owner of the premises. * * *

The cases relied upon by the appellants are not in point. As we have shown above, in *Feldwin Realty* the lease had already been terminated. In *Maryland National Bank v. United States*, 227 F. Supp. 504 (Md.), the Government expressly agreed to pay rent to the landlord for the period January 3, 1962, to January 24, 1962. The Government, however, remained in possession until February 8, 1962, and the landlord claimed rent from the United States for this latter period. Here, there was no express agreement by the United States to pay rent for any period.

In *United States v. Curuso* (W.D. Pa.), decided December 31, 1958 (3 A.F.T.R. 2d 515), the landlord seemingly had already moved against the tenant before the Government seizure, for the landlord had itself already seized the tenant's personal property for nonpayment of rent. The court without discussion allowed the landlord to recover against the United States for the rental value of the premises.

The above cases all involved the seizure by the Internal Revenue Service of the tenant's property for the

nonpayment of taxes. *Carroll v. United States*, 229 F. Supp. 891 (W.D. Ark.), involved the Small Business Administration as mortgagee of a tenant's cafeteria equipment. There the leased premises had been taken over by the tenant's trustee in bankruptcy. On May 29, 1963, the trustee abandoned all claims to the cafeteria equipment to the Small Business Administration, and the landlords were allowed to recover from the Government for the rental value for the period after the trustee abandoned the equipment. It is evident that in *Carroll*, the tenant's right to possession was terminated by its bankruptcy. In the instant case the record shows no termination of the tenant's right to possession.

As the above cases demonstrate, there is no valid claim by a landlord against the Government for the rental value of premises temporarily occupied by the Government where the tenant's right to possession has not been terminated. The appellants at no time made any attempt to exercise their right to recover the right to possession from their tenant, Lichty Printing. (R. 22.) Apparently they did not want to terminate their advantageous long-term lease with the tenant (R. 13) and desired to continue the lease and collect the back rent from their tenant in the hope that the tenant would pay its tax debt. It is inconsistent of them to contend here for the rental value of the premises against the Government, since any recovery would be based on an interference with their right to possession. The appellants had in fact exercised none of the available rights to regain the immediate right to possession.

The appellants' sole remaining argument is that the Government by padlocking the premises deprived them of the right to re-enter the premises. (Br. 14-15.) However, the lease required the appellants "to declare this lease to an end and cancel the same" in order to re-enter the premises. (R. 16-17.) The appellants have

not alleged any such cancellation or termination of the lease. In any event, as we have indicated above, the landlords retained and were free to exercise their right to terminate the lease by bringing a summary action for possession as provided by the Arizona statute, which they did not exercise. Thus, contrary to the appellants' assertion (Br. 15), they were not deprived of the right to regain possession of the premises and to rent the premises to someone else. The appellants chose not to exercise their readily available remedies under both the lease and the Arizona statutes.

As the court below held (R. 22-23) —

In viewing the amended complaint in the light most favorable to the plaintiffs, it does not appear therefrom that at the time of the taking, or thereafter, plaintiffs had any right to the possession of the premises as against the tenant, Lichty. This, because it does not appear from the pleadings that the plaintiffs exercised any of their rights against the tenant, Lichty, which would place the possession of the premises in the plaintiffs. The defendant, therefore, seized only the property of the tenant, Lichty, which it was entitled to do under the law.⁵

Thus, taking all of the facts as admitted, the District Court correctly held that the appellants have failed to state a claim against the Government upon which relief can be granted under any right to recover under 28 U.S.C., Section 1346(a)(2).

⁵ The appellants argue (Br. 14) that the District Court's reasoning would prevent recovery even if Lichty Printing were a trespasser. However, it seems clear that, if that were the case, the landlords would have had the immediate right to possession, which they did not have in the case before this Court.

refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and Sale of Property*.—The term “levy” as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) *Successive Seizures*.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable until the amount due from him, together with all expenses, is fully paid.

* * * *

(26 U.S.C. 1958 ed., Sec. 6331)

28 U.S.C.:

Sec. 1346. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * *

4 Arizona Revised Statutes Annotated (1956):

§12-1171. *Acts which constitute forcible entry or detainer*

APPENDIX

Constitution of the United States:

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954:

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or

refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and Sale of Property*.—The term “levy” as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

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* * * *

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* * * *

4 Arizona Revised Statutes Annotated (1956):

§12-1171. *Acts which constitute forcible entry or detainer*

A person is guilty of forcible entry and detainer, or of forcible detainer, as the case may be, if he:

* * * *

3. Wilfully and without force holds over any lands, tenements or other real property after termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession.

11 Arizona Revised Statutes Annotated (1956):

§33-361. *Violation of lease by tenant; right of landlord to re-enter; summary action for recovery of premises; appeal; lien for unpaid rent; enforcement*

A. When a tenant neglects or refuses to pay rent when due and in arrears for five days, or when tenant violates any provision of the lease, the landlord or person to whom the rent is due, or his agent, may re-enter and take possession, or, without formal demand or re-entry, commence an action for recovery of possession of the premises.

B. The action shall be commenced, conducted and governed as provided for actions for forcible entry or detainer, and shall be tried not less than five nor more than thirty days after its commencement.

* * * *

No. 20359

In the

United States Court of Appeals

For the Ninth Circuit

ARNOLD A. SMITH and RACHAEL SMITH, his
wife; and HERBERT SMITH and EVELYN
SMITH, his wife,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Arizona

Honorable WALTER E. CRAIG, District Judge

Appellants' Reply Brief

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Honorable WALTER E. CRAIG, District Judge

Appellants' Reply Brief

STATEMENT OF THE CASE

The statement contained in appellee's Brief (pp. 2-5) is very similar to that of appellants. The Government has chosen to state the facts by referring to appellants' original Complaint (T.R. 1-3), which was dismissed by the District Court's Order of April 6, 1965 (T.R. 5-7), and then pointing out the different or additional allegations contained in appellants' Amended Complaint (T.R. 8-11). No confusion should exist because of the manner in which the Government has stated its facts, although it should be remembered

that the issue before this Court is the correctness of the District Court's Judgment dated August 3, 1965, dismissing plaintiffs' Amended Complaint. (T.R. 24) For ease of reference and convenience, appellants' Amended Complaint has been set forth verbatim in the Appendix to Appellants' Opening Brief.

REPLY TO APPELLEE'S ARGUMENT

I. The Government Took Appellants' Right to Possession

Throughout its Brief (pp. 7, 12), the Government concedes that at the time of its seizure, appellants had the right to recover possession of their property by reason of the failure of the tenant-taxpayer to pay rent. This right was accorded both by the default clause in tenant-taxpayer's lease and by the provisions of Section 33-361, Arizona Revised Statutes (1956).

It is quite true that at the moment of seizure, the Government took actual possession of the property from the tenant-taxpayer, not appellants. It is also true, as the Government concedes, that the right of the Government to continued possession of appellants' property was derived from, and no better than, the right of the tenant-taxpayer. *Stuart v. Willis*, 244 F.2d 925, 929 (9th Cir. 1957).

The essence of the Government's case is found in its contention (Brief, pp. 7, 8, 12, 13) that appellants failed to allege any action after the seizure to cancel the lease and regain possession of the property *from the tenant-taxpayer*. This contention is then followed with the conclusion that the Government (and the tenant-taxpayer) was therefore entitled to continued possession of the property.

The Government ignores the allegations that on the day it padlocked the premises, appellants advised the Government that they owned the property, demanded possession of the premises and advised the Government that they

would look to it for payment of rent if it continued in possession. It also ignores the allegation that five and a half months later, the Government returned the premises to appellants.

Appellee suggests that appellants could have commenced an action for forcible entry and detainer. Against whom? The action would not lie against the tenant-taxpayer because it was no longer in actual possession of the property. *Byrd v. Peterson*, 66 Ariz. 253, 186 P.2d 955 (1947). Against the Government? The United States, as sovereign, is immune from suit save as it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 61 Sup. Ct. 767, 85 L.Ed. 1058 (1941). Appellants are unable to find any Act of Congress or Court rule, and the Government cites none, authorizing a forcible entry and detainer action against the United States while acting within its lawful power to seize the property of a delinquent taxpayer. If appellants had sought a mandatory injunction or ejectment against the United States, the Government would have successfully defended on the grounds that the Tucker Act afforded appellants an adequate remedy in damages. 6 Nichols, *Eminent Domain* (3d ed. 1953) §§ 29.21-29.22. Even the Government does not suggest that appellants should have taken possession by self-help. It is clear, therefore, that there was no way for appellants to exercise their right to recover possession of their property, a right which the Government concedes.

The default clause in the lease (T.R. 16-17) dictates no particular form of cancellation or declaration. When appellants demanded possession of their property from the Government, the demand was declaration enough that the lease was at an end. In fact, the demand by appellants and refusal to surrender possession by the Government was equivalent to re-entry. *Harmon v. Pohle*, 46 Ind.App. 369, 92 N.E. 119

(1910); *Lucas Hunt Village Co. v. Klein*, 358 Mo. 1054, 218 S.W.2d 595 (1949). The law does not require a futile act, in this case demand for possession from the tenant-taxpayer, because the Government, not the tenant, was in possession of the premises. It seems clear that appellants' right to possession of the property was recognized by the Government when, the property being no longer needed, it returned the premises to appellants, not the tenant-taxpayer.

After demand for possession by appellants, the Government's continued possession of appellants' property was by virtue of its own authority (28 U.S.C. § 6331) and not derived from the tenant-taxpayer. There was nothing more appellants could or should have done, under the Constitution and laws of the United States, to regain the possession which was rightfully theirs. Indeed, they now seek to enforce their only remedy, which was provided by Congress in the Tucker Act, to recover just compensation.

II. There Was an Implied Contract for the Payment of Rent

Appellee concedes the line of authority which holds that there is an implied contract where there has been a taking of private property for public use without just compensation.

In this case there is more than just a taking. At the time of the taking appellants advised the Government that they would look to it for the payment of rent if it continued in possession. The regulations of the Internal Revenue Service provide for the payment of rent to a landlord for storage upon his premises of property seized from a tenant-taxpayer. *Feldwin Realty Co. v. United States*, 169 F.Supp. 73 (D.C.N.J. 1959), *adhered to on rehearing*, 179 F.Supp. 70 (D.C.N.J. 1959). The conduct of the Government in retaining possession of appellants' property is sufficient to

imply that it agreed to pay appellants the reasonable rental value of the property. *Maryland National Bank v. United States*, 227 F.Supp. 504 (D.C. Md. 1964).

III. Appellants' Right to Possession Cannot Be Taken Without Just Compensation

Appellee's attempt to distinguish the cases supporting appellants' position is futile.

The decision in *Maryland National Bank v. United States*, *supra*, 227 F.Supp. 504, is squarely in point. The supposed distinction made in appellee's Brief (p. 8) is false. The issue in this case had nothing to do with the express agreement by the Government to pay the landlord rent. The important issue was the obligation of the Government to pay rent for a holding period for which there was no express agreement. The court in that case held in favor of the landlord-owner *notwithstanding* the failure to demand possession from the Government.

When, in this case, appellants demanded possession from the Government, Lichty Printing and Business Forms, Inc. became a *former* tenant. The facts are therefore indistinguishable from those in *Feldwin Realty Co. v. United States*, *supra*, 169 F.Supp. 73, and *United States v. Caruso*, 3 Am. Fed. Tax R.2d 515 (D.C.W.D. Pa. 1958). The incident of bankruptcy cancels a lease no more effectively than the failure of the tenant to pay rent and consequent demand for possession by the landlord. The case of *Carroll v. United States*, 229 F.Supp. 891 (D.C.W.D. Ark. 1964) is, therefore, also in point.

The cases relied upon by the Government, while apparently supporting its position, are distinguishable. In *Hirsch v. United States*, 170 F.Supp. 229 (D.C.E.D.N.Y. 1959), although a warrant to dispossess the tenant had been issued pursuant to the law of New York, the plaintiffs made no

attempt at any time to take possession of the property from either the tenant or the Government (a fact which the Brief for the appellee fails to mention). In addition, after the Government seizure:

“... [T]he plaintiffs made no objection to such holding of possession or to the padlocking; . . . [and] at no time did plaintiffs demand payment from the Director for use and occupancy.” 170 F. Supp. at 231.

In this case appellants demanded both possession of their premises from the Government and, in the event of refusal, rent for the Government's use and occupancy.

The case of *Roxfort Holding Co. v. United States*, 176 F. Supp. 587 (D.C.N.J. 1959), is likewise distinguishable since the landlord made no attempt to recover the premises from either the tenant or the Government and the facts as set forth in the decision did not support a contract implied in fact for the payment of rent.

It should also be noted that the period of the Government's occupancy in both of the foregoing cases was relatively short. In *Hirsch* the Government occupied the landlord's premises for a mere twenty-one days, and in *Roxfort* for twenty-six days. In this case the appellants were deprived of the use and enjoyment of their premises for over five and one-half months.

The cases supporting appellants' position are the more recent and better-reasoned decisions. In discussing the two opposing views, Mertens, *Law of Federal Income Taxation*, states:

“It has been held that a landlord may not collect rent from a District Director who seized a tenant's personal property for nonpayment of taxes and padlocked the premises until the property was sold and removed by the purchaser unless the Director, either expressly or impliedly, agreed to make payment for the use and

occupation of the premises. The Court suggested that, in all fairness, the Government should immediately remove seized property to its warehouse or place where it intends to conduct a sale thereof, unless the party in possession of the demised premises consents that it remain there. *The contrary view seems sounder since the Regulations provide that when the property seized is located in rented premises, arrangements should be made with the landlord for storage of the property rent-free on the premises and, in the event, the landlord refuses to store the property rent-free, a reasonable charge for storage should be arranged. Furthermore, the Government can be held liable under the Fifth Amendment which provides that private property may not be taken for public use without just compensation.*" (Emphasis added) 9 Mertens, *Law of Federal Income Taxation* (1965 revision of Vol. 9) § 49.191, pp. 283-84.

The Federal Government cannot be allowed to levy upon and seize property of a tenant located on rented premises and thereafter occupy and use the landlord's premises without paying for them under the guise of a legal technicality such as is urged by the Government in this case. Such action on the part of a sovereign smacks of totalitarian rule and is in direct violation of the prohibition of the Fifth Amendment to the United States Constitution. As the Supreme Court said in *United States v. Dickinson*, 331 U.S. 745, 748, 67 Sup. Ct. 1382, 1384, 91 L.Ed. 1789, 1793 (1947):

"The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'"

CONCLUSION

The Judgment of the District Court should be reversed and appellants' Amended Complaint should be reinstated.

Respectfully submitted,

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CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JARRIL F. KAPLAN

Attorney for Appellants

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FOR THE NINTH CIRCUIT

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GEORGE A. FORDE,

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APPELLANT'S OPENING BRIEF

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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLANT'S OPENING BRIEF

I

STATEMENT OF THE PLEADINGS AND FACTS
DISCLOSING JURISDICTION

A. On December 9, 1964, the Federal Grand Jury for the Southern District of California, Central Division, returned a 5-count indictment against the two appellees in Case No. 34352 [C. T. 54]. ^{1/} Count One charges a conspiracy to suborn perjury, to commit perjury and to obstruct justice in violation of 18 United States Code, §371 in the underlying case, No.33087-CD [C. T. 56-57]. ^{2/}

^{1/} C. T. signifies Clerk's Transcript of Record.

^{2/} Amsler, Irwin, and Barry Worthington Keenan, the third defendant in Case No. 33087-CD were named as unindicted co-conspirators [C. T. 56].

Counts Two and Three charge subornation of perjury as to witness-defendants Joseph Clyde Amsler and John William Irwin, respectively, in case No. 33087-CD in violation of 18 United States Code, §1622 [C. T. 61, 131]. Counts Four and Five charge obstruction of justice in the corrupt endeavor to influence and impede the witness defendants Amsler and Irwin, respectively, by having them testify falsely as to certain specified subjects in violation of 18 United States Code, §1503 [C. T. 199, 201].

B. On January 12, 1965, appellee Forde moved to Dismiss the Indictment on the ground that the indictment does not state facts sufficient to constitute a public offense [C. T. 202-214]. On the same date, appellee Root filed a Motion to Quash the Indictment [C. T. 215-216] on the grounds inter alia that the indictment fails to state an offense against the laws of the United States and that the Court was without jurisdiction of the offense charged [C. T. 217-231]. On January 21, 1965, appellant, United States of America, filed its opposition to defendants' motions [C. T. 232-242]. A Supplemental Motion to Dismiss the Indictment on behalf of appellee Root was filed on January 18, 1965 [C. T. 244-248] with Supplemental Points and Authorities thereafter filed on her behalf on January 29, 1965 [C. T. 251-268] and on February 18, 1965 [C. T. 277-285]. On February 25, 1965, appellant filed its Supplemental Opposition to defendants' Motions to Dismiss [C. T. 269-275].

C. Hearing was had on the Motions to Dismiss on February 1, 1965 [C. T. 289] [R. T. ^{3/} Vol. III, pp. 6-44] and

^{3/} R. T. signifies Reporter's Transcript of Proceedings comprised of Volumes II and III.

February 15, 1965 [C. T. 290] [R. T. Vol. III, pp. 47-93]. The judgment and order of the District Court dismissing the indictment was entered on June 30, 1965 [C. T. 286-288].

D. On July 28, 1965, the Government filed a Notice of Appeal from the Order of the District Court dismissing the Indictment [C. T. 291-292].

E. The jurisdiction of the United States District Court for the Southern District of California, Central Division, was based upon Section 3231 of Title 18, United States Code. Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Sections 1291 and 1294 of Title 28, United States Code and Section 3731 of Title 18, United States Code.

II

STATUTES AND RULE INVOLVED

The pertinent statutes and rule of the Federal Rules of Criminal Procedure, provide in part:

18 U. S. C. §371

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years,

or both. . . ."

18 U.S.C. §1621:

"Whoever having taken an oath before a competent tribunal . . . willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. . . ."

18 U.S.C. §1622:

"Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

18 U.S.C. §1503:

"Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . in the discharge of his duty . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

Rule 7(c)(d), Federal Rules of Criminal Procedure:

"(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain . . . any other matter not necessary to such statement. . . ."

"(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information."

III

QUESTION PRESENTED

The following question is presented by this appeal: Did the District Court err in its determination that the indictment returned against appellees on December 9, 1964 does not state an offense against the United States, and in granting the motions of appellees to dismiss the indictment?

IV

STATEMENT OF THE CASE

In order to provide the setting essential to a determination of this appeal, some recital of the history of this case is necessary.

The indictment at issue in this case stems from the trial and conviction in March, 1964, of three defendants who were charged with the interstate transportation of kidnap victim, Frank Sinatra, Jr. [C. T. 55, 286]. The underlying case, United States of America v. Barry Worthington Keenan, Joseph Clyde Amsler and John William Irwin, No. 33087-CD, Southern District of California, Central Division ^{4/} is herein sometimes referred to as the Sinatra kidnapping case. Appellee Forde was one of the attorneys for defendant Amsler and appellee Root represented defendant Irwin

^{4/} Each defendant appealed his conviction to this court (No. 19509). Keenan has since dismissed his appeal and the appeals of Amsler and Irwin are sub judice.

[C. T. 56]. A basic defense put forward at the trial in the testimony of Amsler and Irwin was that the kidnapping was actually a publicity stunt which the victim knew about before it occurred; that as part of this hoax the defendants agreed to allow themselves to be apprehended and further agreed that, once apprehended, they would cooperate with the police enforcement officials and act as if they had really kidnapped Frank Sinatra, Jr. [C. T. 64-70, 125-126, 142-144, 161-164, 210].

In July, 1964, a three-count indictment was returned against appellees charging that they corruptly endeavored to influence Amsler and Irwin to give the allegedly false testimony noted above in violation of the obstruction of justice statute, 18 U.S.C. §1503 (counts 2 and 3) and with conspiracy, in connection with such testimony, to violate 18 U.S.C. §§371, 1503, and the perjury statute, 18 U.S.C. §621 (count one) [C. T. 2-7] ^{5/}. The court below dismissed this indictment on the ground that it failed to state an offense essentially for lack of specificity ^{6/} [C. T. 53; R. T.

^{5/} A copy of this indictment, hereafter sometimes referred to as the first indictment, is attached hereto as appellant's Appendix A.

^{6/} Appellees' principal argument for dismissal of the first indictment was that it lacked sufficient specificity [R. T. Vol. II, pp. 10, 12; C.T. 31]. The Court below, in holding that Counts 2 and 3 (obstruction of justice counts) did not state an offense, in part, stated: ". . . and in my view neither Count 2 nor 3 do, and . . . they cannot unless they set forth the . . . false testimony in haec verba and allege that it was material and show wherein it was material to the charge that was then pending." [R. T. Vol. II, pp. 73-74].

Vol. II, pp. 69, 75, 102].

The matter was thereafter presented to another Federal Grand Jury, and in December, 1964, in the United States District Court for the Southern District of California, Central Division, the present five-count indictment was returned against appellees dealing with the same general subject matter [C.T. 54]. In summary it charges a conspiracy to suborn perjury, commit perjury and obstruct justice, 18 U.S.C. §§ 371, 1503, 1621, 1622 (Count one) [C. T. 55-59], suborning the perjury of Amsler and Irwin, 18 U.S.C. §1622 (Counts two and three) [C. T. 61, 131], obstructing justice by corruptly endeavoring to influence, intimidate and impede Amsler and Irwin by having them testify falsely, 18 U.S.C. §1503 (Counts four and five) [C. T. 199, 201].

The charging clause of the conspiracy count, Count one, after alleging facts as to the underlying Sinatra kidnapping case in the language of the statute [C. T. 55-57], alleges that the "primary object of said conspiracy was to obtain an acquittal by improper and unlawful means for the unindicted co-conspirators Barry W. Keenan, Joseph Clyde Amsler and John William Irwin. . ." [C. T. 57]; that " . . . it was part of said conspiracy that . . . Amsler and . . . Irwin would take the witness stand and testify in their own behalf . . ." and that they " . . . would be instructed to testify falsely and would testify falsely" as to six "material subjects", i. e., that Frank Sinatra, Jr. knew beforehand that he was to be kidnapped; that the kidnapping was planned by people "higher up" than Barry W. Keenan; that the kidnapping was a publicity stunt and a hoax; that

there was a person named "Wes" or "West" who was involved in planning the kidnapping; that they were to be caught by law enforcement personnel; and that, once they were caught, they would conduct themselves as if they had really kidnapped Frank Sinatra, Jr. and not reveal that it was a hoax and publicity stunt 7/ [C. T. 57].

These subjects of false testimony are repeated in the obstruction of justice counts (Counts four and five) which allege that appellees "wilfully and knowingly, did corruptly endeavor to influence, intimidate and impede" Amsler and Irwin by having each ". . . testify falsely and contrary to his oath as a witness on said six 'material subjects'." [C. T. 199, 201].

The subornation of perjury counts (Counts two and three) make the same allegations but further detail in haec verba the actual testimony given by Amsler and Irwin on these subjects and detail the specific aspects as to which such testimony was false. As to Amsler, there were twelve specifications of perjury [C. T. 61-129. See also Appendix B]. As to Irwin, there were twenty-one such specifications [C. T. 131-197. See also Appendix C].

7/ [There were no such specific allegations in the first indictment (See Appendix A).] The second indictment also alleges that it was "part of said conspiracy that they would convey and publish the false information that the charged crimes were arranged as a publicity stunt and hoax by and on behalf of Frank Sinatra, Jr." [C. T. 57-58].

Appellees moved to dismiss this indictment on grounds reminiscent of their attack on the first indictment [C. T. 204, 207, 211-213]. 8/

The Court below, in dismissing this indictment, on the ground that it, as with the first indictment, failed to charge an offense, stated that it could not " . . . Conscientiously come to a judgment that the defendants are sufficiently informed . . . of the charges against them, so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants . . . they could plead a former acquittal or conviction . . . " [C. T. 287-288]. 9/

V

SPECIFICATION OF ERROR

The court below erred:

(1) In ruling that the indictment and each of the five counts therein was insufficient in failing to state an offense; and

8/ By stipulation each appellee adopted the motions brought by the other [R. T. Vol. III, pp. 6-7].

9/ As we read its opinion, the District Court dismissed the present indictment solely on the ground of insufficiency inasmuch as it rejected the other challenges made by appellees, i. e., that the indictment violated their Fifth Amendment Rights; that the District Court lacked jurisdiction; that incompetent and insufficient evidence was submitted to the Grand Jury; and that the Grand Jury was biased and prejudiced [C. T. 288, 215]. Accordingly, we do not deal with these other issues herein.

(2) In dismissing the indictment returned on December 9, 1964 [C. T. 288].

VI

SUMMARY OF ARGUMENT

The indictment returned on December 9, 1964, was sufficient. Each count fully informs the accused of the nature of the crime charged, as required by the Sixth Amendment and clearly states the "essential facts constituting the offenses charged" as required by Rule 7(c) of the Federal Rules of Criminal Procedure.

As to Count one (the conspiracy count) and Counts four and five (the obstruction of justice counts), the District Court adopted the argument of appellees that the indictment fails to state what the false testimony was or would be, despite the fact that in six subject areas, the matters alleged are highly specific and the indictment alleges that the witnesses Amsler and Irwin "would be instructed to testify falsely, and would testify falsely" as to those "material subjects". The particular areas of false testimony charged are thus specifically set forth.

As to Counts two and three (the subornation of perjury counts), where the specific false testimony as to each of the matters is set forth in haec verba, the basis of dismissal is indicated merely by the references by the Court below to their length and the number of questions and answers as set forth. These two counts not only set forth the actual testimony alleged to be false, but

allege, as to each specification, the particular respects in which it was false.

Appellees argued below that the indictment is defective because, while it alleges that the appellees and the witnesses (i. e. appellees' clients at the trial) knew that the testimony of the witnesses was false, it does not allege that the appellees knew that the witnesses knew the testimony was false. The present indictment, however, does in fact allege that appellees "knowingly procured, induced, instigated, and suborned" the witnesses to "knowingly commit perjury". Similar words have been held sufficient.

As to appellees' argument that materiality is alleged only generally, the rule in the Federal Courts is that materiality may be so alleged. This indictment alleges that the testimony was material to the issues of guilt or innocence as framed by the indictment and pleas of not guilty entered by the defendants in the Sinatra kidnapping case and the nature of the materiality is self-evident from the nature of the testimony pleaded.

As to appellees' contention below that the indictment is not a plain, concise statement within the meaning of Rule 7(c), Federal Rules of Criminal Procedure, this assertion is obviously inappropriate as to Counts one, four and five. As to Counts two and three, the detailed allegations relate to some thirty-one specifications of perjury. Allegations of additional testimony provide the background and setting for the respective areas of perjury. At most, assuming arguendo, any of such allegations are found to be unnecessary to the indictment, they may be treated as surplusage.

VII
ARGUMENT

A. THE INDICTMENT IS SUFFICIENTLY
PLEADED.

Generally speaking, an indictment must inform the defendant "of the nature and cause of the accusation" pursuant to the Sixth Amendment to the Constitution and must state "The essential facts constituting the offense charged" as required by Rule 7(c) of the Federal Rules of Criminal Procedure. As the Supreme Court stated in Hagner v. United States, 285 U.S. 427 at 431 (1932):

"The true test of the sufficiency of an indictment is * * * whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, *** whether the record shows with accuracy to what extent he may plead a former acquittal or conviction'." United States v. Debrow, 346 U. S. 374, 377-378 (1953); Russell v. United States, 369 U. S. 749, 763-764 (1962).

Rule 7(c) of the Federal Rules of Criminal Procedure provides that "The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged", and that it "need not contain * * * any other

matter not necessary to such statement".

While on the threshold of dealing separately with each of the five counts and the attacks in the court below on the indictment, several general observations need to be made. As a matter of pleading, each count stands or falls on the strength of its own allegations and must be considered alone. United States v. Hughes Tool Co., 78 F.Supp. 409, 411 (D.C. Hawaii 1948); United States v. Apex Distributing Co., 148 F.Supp. 365, 373 (D.C. R.I. 1957). Although the court below and counsel for appellee Root paid lip service to this principle [R. T. Vol. III, pp. 40, 65], this is what they failed to do [C. T. 287; R. T. Vol. III, pp. 83, 84].

As to the first indictment, it must be remembered that the appellees persuaded the Court below that it should be dismissed for lack of specificity [R. T. Vol. II, pp. 69, 70, 73-75, 102]. The present indictment is attacked for having pleaded too much [R. T. Vol. III, pp. 32, 33, 52, 53; C. T. 277, 278]. The sufficiency of an indictment must be determined on the basis of practical rather than technical considerations. Medrano v. United States, 285 F.2d 23, 26 (9th Cir. 1960), cert. den. 336 U.S. 968 (1961); rehearing den. 368 U.S. 872 (1961).

We now turn to a detailed consideration of each of the five counts.

B. COUNT ONE IS SUFFICIENT TO CHARGE
A CONSPIRACY.

This indictment clearly alleges the elements of a conspiracy. The essence of the crime of conspiracy is an agreement to commit an offense against the United States plus at least one overt act of one or more of the conspirators to effect the object of the conspiracy. United States v. Falcone, 311 U.S. 205, 210 (1940); Blumenthal v. United States, 158 F.2d 883, 888-889 (9th Cir. 1946), aff'd 332 U.S. 539 (1947).

Count One charges that "beginning on or about December 14, 1963 and continuing to on or about March 7, 1964, defendant Gladys Towles Root, defendant George A. Forde, and unindicted co-conspirators Barry W. Keenan, Joseph Clyde Amsler and John William Irwin agreed, confederated and conspired together to defraud the United States and to commit offenses against the United States, to wit:

a. To corruptly endeavor to influence, intimidate, and impede witnesses in the discharge of their duties as witnesses in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 U.S.C. §1503;

b. To suborn perjury in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 U.S.C. §1622;

c. To commit perjury in the United States District Court for the Southern District of California in Case 33087-CD, in

violation of 18 U. S. C. §1621;

d. To corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 U. S. C. §1503"[C. T. 56, 57].

In addition to setting forth the gist of the offense of conspiracy and the agreement to commit the unlawful acts, it is alleged that "the primary object of said conspiracy was to obtain an acquittal by improper and unlawful means" for the unindicted co-conspirators Keenan, Amsler and Irwin in case No. 33087-CD; that "It was part of said conspiracy that unindicted co-conspirators" Amsler and Irwin "would take the witness stand and testify in their own behalf"; that "It was part of said conspiracy" that unindicted co-conspirators Amsler and Irwin "would be instructed to testify falsely, and would testify falsely * * *"; and that "it was further part of said conspiracy that they would convey and publish the false information that the charged crimes were arranged as a publicity stunt and hoax by and on behalf of Frank Sinatra, Jr." [C. T. 57, 58].

It is further alleged that the appellees and the unindicted co-conspirators"committed numerous overt acts in furtherance of said conspiracy and to effect the objects thereof . . . " there being pleaded in Count One some eighteen such overt acts [C. T. 58, 59].

Assuming, arguendo, that nothing further had been pleaded

in this conspiracy count, appellant submits that, under settled rules of conspiracy pleading, Count One would have been legally sufficient. The simplified form of an indictment necessarily requires use of general terms to express ultimate facts. This was permissible even before the adoption of Federal Rules of Criminal Procedure and even under the old English law. Brown v. United States, 143 Fed. 60, 65 (8th Cir. 1906), cert. den. 202 U.S. 620 (1906).

By its terms, Rule 7(c) Federal Rules of Criminal Procedure, requires pleading of only the substance of the offense. Generally, indictments framed merely in the language of the statute which charge the offense have been sustained. Smiley v. United States, 181 F.2d 505, 508 (9th Cir. 1950), cert. den. 340 U.S. 817, 818; Wong Tai v. United States, 273 U.S. 77-81 (1927); United States v. Chunn, 347 F.2d 717, 719 (4th Cir. 1965); cf. Russell v. United States, 369 U.S. 749 (1962). Since the adoption of the Federal Rules of Criminal Procedure, technical objections to indictments are not valid where the elements of the offense are clearly set forth. Stapleton v. United States, 260 F.2d 415 (9th Cir. 1958).

The main attack on Count one is that it fails to state what the alleged false testimony was or would be [C. T. 207].

The court below in adopting appellees' contention made the following observation:

"While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced

Amsler and Irwin to testify falsely * * * which false testimony may or may not be found scattered somewhere among the 745 questions and answers * * * contained in Counts Two and Three or somewhere else * * *." [C. T. 287].

The error in this reasoning is apparent were we to assume, arguendo, that Amsler and Irwin had never taken the stand and never given false testimony. Yet if appellees Forde and Root had previously agreed to suborn either Amsler or Irwin to commit perjury and a single overt act were performed in furtherance of the agreement, would not a conspiracy offense lie? United States v. Rabinovich, 238 U.S. 70, 82 (1915); American Tobacco Co. v. United States, 328 U.S. 781, 789 (1946). By what omniscience is Government counsel, in drawing a conspiracy indictment in the assumed case, expected to allege what the exact perjured testimony would have been? [C. T. 239, 270]

It is submitted that the Court below erred in dismissing Count one of the present conspiracy indictment which count fully satisfies the test of sufficiency announced in Hagner v. United States, 285 U.S. 427, 431, *supra*, p. 12; United States v. Debrow, 346 U.S. 374, 377-378, *supra* p. 12. See also Wong Tai v. United States, 273 U.S. 77, 81-82 (1927); Stein v. United States, 313 F.2d 518, 520 (9th Cir. 1962), cert. den. 373 U.S. 918 (1963). It charges appellees, with definiteness and reasonable particularity as to time and place, with conspiring with named persons [C. T.

56] to commit specified offenses [C. T. 56-57]. It further charges appellees in like manner with doing various specified acts to effect the object of the conspiracy [C. T. 57-59]. Moreover, appellees were defense attorneys in the Sinatra kidnapping case [C. T. 56]. They had access to all the files, records and daily copies of the Trial Transcript, and both were present in court when Judge East, the trial judge, referred the matter to the Federal Grand Jury [C. T. 15]. The indictment alleges the pendency of the six-count indictment in the Sinatra kidnapping case, identifies the defendants in that pending indictment, and gives the details of each of the six counts charged in the indictment in that case [C. T. 55]. It sets forth the procedural steps of arrest, arraignment, pretrial motions, pleas and jury trial, and the relationship of these appellees to those proceedings [C. T. 55-56]. As to the subornation of perjury and perjury aspects of Count one, it alleges with specificity that the instructions to testify falsely and the material subjects of false testimony would be:

"a. That Frank Sinatra, Jr. knew before hand that he was to be kidnapped;

"b. That the kidnapping of Frank Sinatra, Jr. was planned by people higher up than Barry W. Keenan;

"c. That the kidnapping of Frank Sinatra, Jr. was a publicity stunt and a hoax;

"d. That there was a person named 'Wes' or 'West' who was involved in planning the kidnapping

of Frank Sinatra, Jr.;

"e. That they were to be caught by law enforcement personnel;

"f. That once they were caught they would conduct themselves as if they had really kidnapped Frank Sinatra, Jr. and not reveal that it was a hoax and publicity stunt." [C. T. 57-58]

It seems inconceivable how this indictment, in this setting, can be deemed insufficient to apprise these appellees of the nature of the charges they would have to meet. Cf. Russell v. United States, 369 U.S. 749, 764, 789, supra, p. 12.

The allegations in this conspiracy count clearly satisfy the requirements of the cases principally relied on by these appellees in the Court below. United States v. Devine's Milk Laboratories, 179 F.Supp. 799 (D. C. Mass. 1960), involved a conspiracy indictment which was dismissed for lack of specificity in that it did not " . . . even indicate the transaction or even the general subject matter in connection with which any false statement or claims were to be made or presented" [Emphasis Supplied] [R. T. Vol. III, pp. 59-60]. See also United States v. Apex Distributing Co., 148 F.Supp. 365, 370, 372 (D. C. R.I. 1957). Russell v. United States, 369 U.S. 749, supra, involved the review of convictions obtained under 2 U.S.C. §192 (a statute punishing persons summoned as witnesses by Congress when such persons, having appeared, refused to answer any questions pertinent to the question under inquiry). In

each case the indictment failed to identify the subject under Congressional subcommittee inquiry at the time the witness was interrogated. The Court held that the determination of the issue of pertinency was of crucial importance and that the indictment must set out in detail the subject under investigation. Russell at pp. 766, 771. Aside from the fact that Russell, of course, did not involve a conspiracy or perjury situation ^{10/}, the requirement announced in Russell is clearly satisfied in that in the present indictment, the six subjects of perjury are clearly specified [C. T. 57-58].

Returning to our assumed case in which Irwin or Amsler had never in fact testified falsely, what more could have been pleaded to sustain this conspiracy count?

This conspiracy count, when compared to a similar count sustained in Williamson v. United States, 207 U.S. 425, 446, 449 (1907) is a fortiori sufficient. In Craig v. United States, 81 F.2d 816, 820 (9th Cir. 1936) a conspiracy pleading similar to the instant indictment was held sufficient. See also Stein v. United States and cases cited therein, 313 F.2d 518, 519-520 (9th Cir. 1962), cert. den. 373 U.S. 918 (1963).

Pettibone v. United States, 148 U.S. 197 (1893), was expressly relied on by the Court below in its dismissal of Count one [C. T. 288]. This reliance was misplaced. Pettibone involved

^{10/} For other reasons which distinguish the majority opinion in Russell from the mainstream of conspiracy pleading cases, see Mr. Justice Harlan's dissent at pp. 783-794 and this Court's opinion in Turf Center Inc. v. United States, 325 F.2d 793 (9th Cir. 1963). See also Government counsel's observations in the instant case [R. T. Vol. II, 33-34, 99-100, R. T. Vol. III, p. 86].

a conspiracy to obstruct justice by inducing the violation of an injunction. Pettibone held that, where persons are indicted for obstructing justice by causing an injunction to be violated, the indictment must allege that the defendants knew of the injunction and the pending court proceedings. There could be no violation of the injunction before it was issued and, upon analogy to contempt, no person could be found guilty unless he knew or had reasonable cause to know that process had issued. See also United States v. Perlstein, 126 F.2d 789, 793 (3rd Cir. 1942), cert. den. 316 U.S. 678 (1942). Can there be any doubt that the allegations which were the concern in Pettibone are clearly present in the present indictment?[C. T. 55-56, supra,p.18]. Additionally,appellees Root and Forde had actual knowledge of the pendency of the Sinatra kidnapping case and related proceedings as attorneys who represented two of the defendants throughout the trial of that case [C. T. 286]. 11/

C. COUNTS TWO AND THREE OF THE
INDICTMENT ARE SUFFICIENT TO
CHARGE SUBORNATION OF PERJURY.

Counts two and three, which charge appellees with suborning Amsler and Irwin to commit perjury in violation of 18 U.S.C. §1622, clearly allege the elements of the crime.

Unlike the conspiracy count and the obstruction of justice counts, which would be sufficiently pleaded even if Amsler and

11/ Appellees did not predicate any part of their attack below on the instant indictment on this problem raised in Pettibone.

Irwin had never taken the stand, the subornation of perjury counts could not state an offense unless perjury was, in fact, committed.

Count Two charges:

"Beginning on or about December 14, 1963, and continuing to on or about March 4, 1964, within the Central Division of the Southern District of California, defendants GLADYS TOWLES ROOT and GEORGE A. FORDE knowingly procured, induced, instigated and suborned Joseph Clyde Amsler to knowingly commit perjury in that, on March 2 and 3, 1964, said Joseph Clyde Amsler, having duly taken an oath before a competent tribunal, namely, the United States District Court, Southern District of California, in Case No. 33087-CD then pending before said Court, a case in which a law of the United States authorized an oath to be administered that he would testify truly, did willfully and contrary to said oath testify to material matters which he did not believe to be true, as follows: . . ."
[C. T. 61].

Count two thereafter details twelve specifications of perjury.

Within each specification, Amsler's testimony as to a certain subject area is grouped together, whether raised by direct examination or cross-examination, followed by a final paragraph which pleads with specificity and certainty precisely what testimony was false. Many of these specifications cover a very few lines of testimony, e.g. IV, VII, VIII, X, and XI [C. T. 92-93; 110-111;

112-113; 123-124; 125-126]. Those specifications which contain more testimony are setting the scene by way of telling time, place, persons present and background of an alleged particular event [C. T. 272. See for example, Specification XI, Count two. C. T. 125, lines 1-16; R. T. Vol. III, pp. 86-87].

Identical charging allegations are contained in Count three except that in Count three the subornee is Irwin and the dates on which he testified were March 4, and 5, 1964 [C. T. 131].

Count three, which charges appellees with suborning the witness Irwin to commit perjury, contains twenty-one such specifications of perjury [See Index to Specifications of perjury by Irwin referenced to the Clerk's Transcript and attached hereto as Appellant's Appendix C].

In each and every specification in both counts the final paragraph sets forth what testimony is false and in what respects [R. T. Vol. III, pp. 88-89] with a general allegation that "The above said testimony was material to the issues of guilt or innocence as framed by the indictment and the pleas of not guilty entered by all of the defendants' in the Sinatra kidnapping case [Appendices B and C. See, for example, Specification I, Count Two, C. T. 70-71].

Thus, on its face, the indictment states all the elements of the offense. As to the perjury aspect, the essential elements are present as set forth in 18 U.S.C. §1621 which defines the crime, supra. They are: (1) that an oath has been administered "before a competent tribunal . . .", (2) that false statements have been wilfully made; and (3) that the statements were material to the

matter under investigation. There can be no serious dispute that elements (1) and (2) are sufficiently alleged in the indictment. As to element (3), appellees contend that materiality cannot be generally alleged. The District Court apparently accepted their argument that as to each specification of perjury the indictment must plead the facts from which the conclusion of materiality was drawn [R. T. Vol. III, 33, 52; Vol. II, 73-74]. This is not the law. Markham v. United States, 160 U.S. 319 (1895); Travis v. United States, 123 F.2d 268 (10th Cir. 1941); Wooley v. United States, 97 F.2d 258 (9th Cir. 1938), cert. den. 305 U.S. 614. Materiality is clearly evident from the very nature of the testimony within the framework of the indictment and the pleas of not guilty in the Sinatra kidnapping case [C. T. 55-56; R. T. Vol. III, pp. 41, 84, 85]. Cf. United States v. Simplot, 192 F.Supp. 734, 736 (D. C. Utah 1961) relied on by appellees in the court below [C. T. 204]. The perjury indictment in Simplot pled only the subject matter of the alleged perjurious conversation without the words or substance. Thus, while rejecting the argument that materiality could not be generally alleged, the Court dismissed the indictment since there was nothing to which to tie the conclusion of falsity. In the present indictment, of course, Counts Two and Three set forth the nature of the testimony in haec verba. Simplot is thus inapposite as to Counts Two and Three and not in point as to the conspiracy and obstruction of justice counts.

As to the subornation aspect, appellees contended that the indictment does not charge that the appellees knew that the witness

knew that the testimony was false, relying on Evans v. United States, 19 Fed. 912 (D. Cal. 1884). Counts Two and Three charge that the appellees " . . . knowingly procured, induced, instigated and suborned . . . " the witnesses " . . . to knowingly commit perjury". Do not these words on their face charge such knowledge? Similar words have been held to satisfy the rule announced in Evans. Ryan v. United States, 58 F.2d 708 (7th Cir. 1932). See also Stein v. United States, 337 F.2d 14, 15 (9th Cir. 1964).

For purpose of illustration, consider several of the thirty-three specifications of perjury common to both Counts Two and Three, which will point up the sufficiency of the manner of pleading of all the specifications of perjury: Specification XI in Count Two [C. T. 125-126] and Specification IV in Count Three [C. T. 142-144].

Specification XI in Count Two sets forth the following testimony by witness-defendant Amsler:

"(Questions by the prosecutor; answers
by Amsler)

"Q. When was the time that you spoke
with Barry Keenan as to how you would answer any
questions that law enforcement put to you?

"A. When was the time?

"Q. Yes.

"A. On, I believe it was, Thursday,
Thursday evening.

"Q. This was after the money had been
picked up?

"A. Yes, sir.

"Q. What did Barry tell you?

"A. We met with John up near John's house and we sat in this car that Barry had brought for John, and --

"Q. The station wagon?

"A. Yes, sir.

"Q. All right, sir.

"A. And we talked about what we should do when we were caught.

"Q. What was said?

"A. He said, 'Cooperate with the FBI, and do your best to show that it was a real crime, a legitimate crime.' Otherwise he would be in trouble and we would be in trouble. And we would get out of this if we followed the plan.

.

"Q. Did you say you got together on this particular time that you are talking about so that you could make plans for John Irwin to get out of town and still arrange to get money to John Irwin's wife?

"A. John said that he was going down south to visit his brother first, and he wanted to know if he was going to send money to his wife, how he could, yes, sir.

"Q. And you discussed that, didn't you?

"A. Yes, sir.

"Q. But you also discussed this area, that Barry said, 'If you get arrested tell a convincing story to make the FBI think that it was a real crime'; is that correct?

"A. All except that, he said we were going to be arrested.

"Q. Barry told you that you were going to be arrested?

"A. Yes, sir.

"Q. And that's the orders that you were following, the instructions, or request, that you were following when you were being interviewed by the FBI; is that correct?

"A. That's correct.

(Reporter's Transcript in Case No. 33087-CD; p. 3417, line 20 to p. 3418, line 15; p. 3420, line 11 to p. 3421, line 5)" [C. T. 125-126].

The closing paragraph then pleads with specificity precisely what portion of the testimony was false, followed by a general allegation as to materiality, i. e.:

"And said testimony was false and contrary to the oath taken by Joseph Clyde Amsler, as Amsler, defendant FORDE and defendant ROOT

then and there well knew and believed in that: At said time and place, Thursday, December 12, 1963, in Los Angeles, California there was no conversation about what to do when Amsler, Barry W. Keenan, and John W. Irwin were caught; nor was there any conversation or instructions to 'Cooperate with the FBI, and do your best to show that it was a real crime, a legitimate crime. Otherwise he (Keenan) would be in trouble and we (Amsler and Irwin) would be in trouble. And we (Keenan, Amsler and Irwin) would get out of this if we followed the plan'; nor did Keenan tell Amsler that when Amsler gets arrested that Amsler was to 'tell a convincing story to make the FBI think it was a real crime.' and said testimony was material to the issues of guilt or innocence as framed by the indictment and pleas of not guilty entered by all of the defendants in Case No. 33087-CD." [C. T. 126].

Specification IV in Count Three sets forth the following testimony by witness defendant Irwin:

"(Questions by defendant ROOT, answers by Irwin.)

"Q. Now, did you have a discussion with Barry about whether or not you were going to continue or not in this so-called plan?

"A. Yes, ma'am.

"Q. At that time?

"A. Yes, ma'am.

"Q. Now, what did you say and what did he say?

"A. Well, I told him that it sounded scatter-brained to me, and that did he realize how big an operation this was, what could happen, and he said, 'Yes', he did realize it. And I -- in order to point out how difficult it was, I told him a town like Phoenix would be impossible for anybody to do such a thing as this. In the first place, it was an easy town to seal off. In the second place, when they had hooked up the phone, I realized there was no long distance direct dialing, and that was one of the fundamental things in this plan. At that time he suggested that we take Frank and get him into California, and I pointed out that he couldn't possibly do that because of the agricultural stations. And actually, it was right there that he gave up the whole plan.

"Q. Did he at that time say anything to you about whether or not the principals, such as Frank, Jr., would be cooperative with you?

"A. Yes, ma'am. He said --

"Q. What did he say?

"A. He said there was nothing to worry about as far as Frank was concerned, that Frank

knew that this was to take place, and there was nothing to worry about on that score. And I said -- then that's when I brought up these other fallacies in this scheme, and whoever the man was -- I told him whoever this person is or these persons are that are directing you in a scheme like this, have they ever seen Phoenix? Do they have any idea of the complications?

.

"THE WITNESS: He told me at that time that he couldn't understand why he hadn't thought of that himself. But he said then that it just couldn't work; it was impossible.

"Q. Did he say anything to you as to why this plan had been presented to him?

"A. No, I don't think so.

"Q. Was there anything further said about the Arizona matter?

"A. Not at that time.

(Reporter's Transcript in Case No. 33087-CD, p. 3520, line 20, through p. 3522, line 3; p. 3522, lines 9 through 17)

"(Questions by the prosecutor; answers by Irwin.)

"Q. I think you just stated when you were coming back from Phoenix as far as you were concerned

the whole deal was off; correct?

"A. Yes, sir.

"Q. And my question to you is: At that time what was your understanding as to what the deal was? You know, what was called off. I don't care if you used the word 'deal' or not.

.

"Q. Can you be more specific, Mr. Irwin?

"A. About what my position was?

"Q. What was the thing that you were not going to have any part of at that time, as you understood it? Was it to be a phony kidnapping?

"A. It was to be a phony kidnapping in every respect. Yes sir."

(Reporter's Transcript in Case No. 33087-CD; p. 3740, line 24 to p. 3741, line 6; p. 3742, line 2 to p. 3743, line 8) [C. T. 142-143].

The closing paragraph then pleads with specificity precisely what portion of the testimony was false, followed by a general allegation as to materiality, i. e. :

"And said testimony was false and contrary to the oath taken by John William Irwin as Irwin, defendant ROOT and defendant FORDE then and there well knew and believed in that: At said time

and place, the end of October 1963, at Phoenix, Arizona, there was no conversation about 'the principals, such as Frank [Sinatra], Jr.' being cooperative with Irwin and Barry W. Keenan; nor did Keenan say to Irwin that 'there was nothing to worry about as far as Frank [Sinatra, Jr.] was concerned, that Frank [Sinatra, Jr.] knew that this was to take place, and there was nothing to worry about on that score'; nor was there any conversation about a person or persons directing Keenan 'in a scheme like this'; nor was the 'deal' to be a 'phony kidnapping in every respect.' And the above said testimony was material to the issues of guilt or innocence as framed by the indictment and the pleas of not guilty . . . in case No. 33087-CD." [C. T. 144].

In addition to alleging the essential elements of the crime, the subornation counts plead, by incorporation by reference to Count One, the salient facts concerning the underlying Sinatra kidnapping case and the relationship of these appellees to Amsler and Irwin in those proceedings [C. T. 55-56, 61, 131]. What more can these appellees expect to advise them of the nature of the charge they would have to meet? Is the Government expected to encumber this indictment with evidentiary detail which might be reached by a bill of particulars? United States v. Polakoff, 112 F.2d 888, 890 (2nd Cir. 1940) cert. den. 311 U.S. 653.(1940).

Counts Two and Three, when compared with the subornation of perjury indictment sustained in Austin v. United States, 19 F.2d 127, 128 (9th Cir. 1927) is, at least, as sufficiently pleaded. See also Segal v. United States, 246 F.2d 814, 816 (8th Cir. 1957); Stein v. United States, 337 F.2d 14, 15 (9th Cir. 1964); United States v. Simplot, 192 F.Supp. 734 (D. C. Utah 1961), supra, p. 24; United States v. Debrow, 346 U.S. 374, supra, p. 12.

**D. COUNTS FOUR AND FIVE ARE
SUFFICIENT TO CHARGE OB-
STRUCTION OF JUSTICE.**

Count Four charges appellees with obstructing justice by corruptly endeavoring to influence, intimidate and impede Amsler by inducing him to testify falsely. After pleading by incorporation by reference, the salient facts concerning the Sinatra kidnapping case, the indictment alleges:

"Beginning on or about December 14, 1963,
and continuing to on or about March 7, 1964, in
Los Angeles County, California, within the Central
Division of the Southern District of California,
defendants GLADYS TOWLES ROOT and GEORGE
A. FORDE unlawfully, willfully, and knowingly,
did corruptly endeavor to influence, intimidate,
and impede a witness, Joseph Clyde Amsler, in
Case 33087-CD by inducing, commanding, request-
ing and having the said Joseph Clyde Amsler knowingly

testify falsely and contrary to his oath as a witness"

on the six material subjects, which are also specified in the conspiracy count [C. T. 199; 57-58].

Count Five is identical with Count Four except that the witness is Irwin. We will, therefore, deal with these counts together.

These counts would be legally sufficient even though the corrupt endeavor had been unsuccessful and Amsler and Irwin had testified truthfully. Roberts v. United States, 239 F.2d 467, 470 (9th Cir. 1956); Catrino v. United States, 176 F.2d 884, 886-887 (9th Cir. 1949). Thus, it is apparent that the appellees misconceive these counts just as they did the conspiracy count. The main thrust of their attack as to both counts is that the false testimony is not set forth, except by subject matter [C. T. 213; R. T. Vol. III, pp. 42, 48, 83]. The same misconception follows in appellee Root's argument that these counts are defective for failure to plead the facts supporting the allegation that the six subject areas were material [R. T. Vol. III, pp. 48-49].

The Court below was led into confusing the requirements of the obstruction of justice counts with concerns of the subornation of perjury counts. At the time of the hearing of the motions to dismiss the first indictment (which contained no subornation of counts) the District Court said (as to whether the obstruction of justice counts stated an offense in that indictment):

" . . . and in my view neither Count 2 nor
Count 3 do, and they will not and they cannot unless
they set forth the alleged perjured . . . testimony

in haec verba and allege that it was material to the charge that was then pending." [R. T. Vol. II, pp. 73-74] [emphasis added]; supra, p. 6, footnote 6.

Supposing that Amsler and Irwin had frustrated the corrupt endeavor by testifying truthfully, the offense of obstructing justice would have taken place (Roberts v. United States, 239 F.2d 467, 470 (9th Cir. 1956), supra), yet how could the pleading requirements stated by the District Court ever be satisfied? As to the present indictment, the Court below was not as illuminating in dealing with these counts. As we read the opinion the District Court generally adopted those grounds advanced by appellees relating to sufficiency ^{12/} and did not deal specifically with the obstruction of justice counts on their separate merits. Perhaps of more significance is what was singled out for comment in the opinion. The District Court said:

" . . . it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning matters . . . described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and

^{12/} The District Court said: "It would serve no useful purpose to indulge in a prolonged dissertation of my views. It is sufficient to say that the motions are granted on the grounds and for the reasons . . . cited by . . . defense counsel . . . in their supporting briefs. . . . [C. T. 288].

answers . . . in Counts II and III, or somewhere else in the 4500 pages of the transcript of the evidence"

[C. T. 287] See pp. 16, 17, supra, concerning the same observation as to the conspiracy count.

Suppose that only one subject area had been pleaded in Counts One, Four and Five, i. e., that the kidnapping was a publicity stunt and a hoax, and suppose only one specification of perjury were alleged, i. e., illustrative specification XI in Count Two and Specification IV in Count Three (See pp. 25-31, supra), would such an indictment be insufficient because it did not plead other subject areas and other false testimony (as to which proof might be lacking) which might lurk in the trial transcript? Segal v. United States, 246 F.2d 814, 816 (8th Cir. 1957), supra. Obviously this would be an erroneous test of sufficiency. On the other hand, if, instead of thirty-three specifications of perjury, there were twice that number, should the number of pages required to plead the perjury be the test of sufficiency?

Appellee Root contends that the present indictment is "verbose and lengthy" and that she " . . . cannot conceive of an indictment of 148 pages being denominated as a "plain, simple statement of the charges" [R. T. Vol. III, p. 52] and the District Court in its opinion appears to have emphasized the length of the subornation of perjury counts [C. T. 287]. This attack on the whole indictment, although a kind of "red herring", should be dealt with. First of all when appellee Root complains that in the first indictment

the Government "said too little and in this one they said too much" [R. T. Vol. III, pp. 32-33], she overlooks the fact that the complaint of "verboseness" is obviously inappropriate as to the conspiracy and obstruction of justice counts, and also that the first indictment contained no subornation of perjury counts (See Exhibit A). Secondly, the subornation counts are comprised of thirty-three distinct specifications of perjury [Appendices B and C]. Appellees complain that the indictment is too long, yet they would require the Government to plead the perjury in haec verba and recite factual details showing materiality not only for the subornation counts but the others as well. One can but speculate as to what would be the length of such a pleading. They can't have it both ways. An indictment is not required to satisfy every objection which human ingenuity may devise. United States v. Straitiff, 14 F. R. D. 337 (D. C. Pa. 1953). As pointed out earlier in this brief, sufficiency must be tested by practical considerations and any unnecessary allegations, if there be such, may be dealt with as surplusage. See pp. 11, 13, supra.

The allegations in these obstruction counts clearly satisfy the requirements of the following cases:

Anderson v. United States, 215 F.2d 84, 85-89
(6th Cir. 1954) 13/;

13/ The indictment which was the focal point of the appeal in that case charged: "That on or about the 18th of February, 1953, at Louisville, in the Western District of Kentucky, Roy E. Anderson and John R. Lewis, Jr., did corruptly endeavor to impede the due administration of justice; that is to say, on or about the date aforementioned, the said Roy E. Anderson and John R. Lewis,
(continued)

United States v. Solow, 138 F.Supp. 812, 816

(D. C. S. D. N. Y. 1956);

Parsons v. United States, 189 F.2d 252, 253

(5th Cir. 1951);

Hicks v. United States, 173 F.2d 570 (4th Cir. 1949);

Nye v. United States, 137 F.2d 73, 75-76 (4th Cir.

1943), cert.den., 320 U.S. 755 (1943);

Seawright v. United States, 224 F.2d 482 (6th Cir.

1955), cert.den., 350 U.S. 838 (1955).

Roberts v. United States, 239 F.2d 467 (9th Cir. 1956),

supra, p. 34. See also Cole v. United States, 329 F.2d 437, 438

(9th Cir. 1964), cert.den. 377 U.S. 954 (1964); Stein v. United

States, 337 F.2d 14, 15-16 (9th Cir. 1964).

The present indictment under the decisions and for the reasons herein discussed is legally sufficient.

13/ (continued): Jr., at Louisville, Kentucky, did agree and promise to W. Stewart Carter that they would alter the testimony of Roy E. Anderson and the testimony of Clifford W. Powers, the said Roy E. Anderson and Clifford W. Powers then being material witnesses in a case then pending in the United States District Court for the Western District of Kentucky against the said W. Stewart Carter, same being indictment No. 23,589, and did by this means corruptly endeavor to impede the due administration of justice."

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
DONALD A. FAREED,
Assistant U. S. Attorney,
Chief Trial Attorney,

Attorneys for Appellant,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Donald A. Fareed

DONALD A. FAREED

APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

February, 1964 Grand Jury

UNITED STATES OF AMERICA,)		NO.	33933		CD
)					
Plaintiff,)					
)					
v.)					
)					
)					
GLADYS TOWLES ROOT,)					
GEORGE A. FORDE,)					
)					
)					
Defendants.)					

I N D I C T M E N T

[18 U. S. C. 371 - Conspiracy.
18 U. S. C. 1503 - Obstruction of Justice.]

The Grand Jury charges:

COUNT ONE

[18 U. S. C. §371]

Beginning on or about December 14, 1963 and continuing to on or about March 7, 1964 defendants GLADYS TOWLES ROOT and GEORGE A. FORDE, and unindicted co-conspirators John William Irwin, Joseph Clyde Amsler, and Barry Worthington Keenan agreed, confederated and conspired to commit offenses against the United States, to wit:

1. To corruptly endeavor to influence, intimidate, and impede witnesses in the discharge of their duties as witnesses in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 U. S. C. §1503;
2. To commit perjury in the United States District

Court for the Southern District of California in Case 33087-CD in violation of 18 U.S.C. §1621; and

3. To corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 U.S.C. §1503.

The primary object of said conspiracy was to obtain an acquittal by improper and unlawful means for the unindicted co-conspirators Irwin, Amsler, and Keenan, who were the defendants in Case 33087-CD in the United States District Court for the Southern District of California.

It was part of said conspiracy that witnesses would be instructed to testify falsely and contrary to the oath of a witness, in Case 33087-CD in the United States District Court for the Southern District of California.

It was further part of said conspiracy that unindicted co-conspirators Irwin and Amsler would commit perjury and testify falsely and contrary to the oath of a witness in Case 33087-CD in the United States District Court for the Southern District of California.

It was further part of said conspiracy to endeavor to influence, obstruct and impede the due administration of justice and prospective jurors, jurors, prospective witnesses, and witnesses prior to and during the trial in Case 33087-CD in the United States District Court for the Southern District of California, by

conveying and publishing both in the courtroom and outside of the courtroom, the false information that there was bona fide evidence that no crimes were committed because the alleged criminal acts were arranged as a publicity stunt and hoax by and on behalf of the alleged victim well knowing that there was no such evidence.

The defendants and the unindicted co-conspirators committed numerous overt acts in furtherance of said conspiracy and to effect the objects thereof, in the Central Division of the Southern District of California, including the following:

1. On or about December 18, 1963, defendant ROOT met with and conversed with unindicted co-conspirator Irwin.

2. On or about December 19, 1963, defendant FORDE telephoned William R. Woodfield.

3. On or about February 3, 1964, defendant FORDE accompanied by Clyde Duber met with and conversed with a prospective witness' parent.

4. On or about February 12, 1964, defendant ROOT had a conversation with Clyde Duber regarding a "Wes".

5. On or about February 14, 1964, defendant ROOT met with and conversed with defendant FORDE, Morris Lavine, and Clyde Duber about "Wes" and "Dawkins".

6. On or about February 15, 1964, defendant FORDE met with and conversed with unindicted co-conspirator Amsler.

7. On or about February 16, 1964, defendant FORDE and defendant ROOT met with and conversed with unindicted co-conspirators Amsler and Irwin.

8. On or about February 16, 1964, defendant FORDE and defendant ROOT met with and conversed with unindicted co-conspirators Irwin, Amsler and Keenan.

9. On or about February 16, 1964, defendant FORDE telephoned Charles Crouch.

10. On or about February 16, 1964, defendant FORDE telephoned Clyde Duber.

11. On or about February 16, 1964, defendant FORDE discussed "Wes" with a press representative.

12. On or about February 19, 1964, defendant ROOT conversed with Clyde Duber regarding "Dawkins", "Webb", and "Wes".

13. On or about February 19, 1964, defendant FORDE conversed with Clyde Duber regarding "Dawkins", "Webb", and "Wes".

14. On or about March 2, 1964, defendant FORDE called unindicted co-conspirator Amsler as a witness in Case 33087-CD, and unindicted co-conspirator Amsler took the witness stand, was sworn, and testified.

15. On or about March 2, 1964, defendant ROOT met with and conversed with unindicted co-conspirator Irwin regarding his testimony.

16. On or about March 3, 1964, unindicted co-conspirators Irwin, Amsler, and Keenan met and conversed with each other regarding Irwin and Amsler's testimony.

17. On or about March 4, 1964, defendant ROOT called

unindicted co-conspirator Irwin as a witness in Case 33087-CD and unindicted co-conspirator Irwin took the witness stand, was sworn, and testified.

18. On or about March 4, 1964, defendant FORDE conversed with unindicted co-conspirator Irwin regarding "Wes".

COUNT TWO

[18 U. S. C. §1503]

Beginning on or about December 14, 1963 and continuing to on or about March 7, 1964 in Los Angeles, California, within the Central Division of the Southern District of California, defendants GLADYS TOWLES ROOT and GEORGE A. FORDE unlawfully, willfully, and knowingly did corruptly endeavor to influence, intimidate, and impede Joseph Clyde Amsler, a witness in case 33087-CD then pending in the United States District Court for the Southern District of California, in the discharge of his duty as a witness by inducing, commanding, requesting, and having the said Joseph Clyde Amsler commit perjury and knowingly testify falsely and contrary to his oath as a witness.

COUNT THREE

[18 U. S. C. §1503]

Beginning on or about December 14, 1963 and continuing to on or about March 7, 1964 in Los Angeles, California, within the Central Division of the Southern District of California, defendants GLADYS TOWLES ROOT and GEORGE A. FORDE unlawfully, willfully, and knowingly did corruptly endeavor to influence, intimidate and impede John William Irwin, a witness in case 33087-CD then pending in the United States District Court for the Southern District of California, in the discharge of his duty as a witness by inducing, commanding, requesting, and having the said John William Irwin commit perjury and knowingly testify falsely and contrary to his oath as a witness.

A TRUE BILL

Foreman

FRANCIS C. WHELAN
United States Attorney

APPENDIX "B"

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AMSLER IN COUNT TWO

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No. 20360

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GLADYS TOWLES ROOT and GEORGE A. FORDE,

Appellees.

Appeal From the District Court for the Southern District
of California, Central Division.

BRIEF OF APPELLEE GEORGE A. FORDE.

FEB 10 1967

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FEB 28 1966

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No. 20360

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GLADYS TOWLES ROOT and GEORGE A. FORDE,

Appellees.

Appeal From the District Court for the Southern District
of California, Central Division.

BRIEF OF APPELLEE GEORGE A. FORDE.

I.

JURISDICTION.

Appellee George A. Forde concurs in the government's Statement of the Pleadings and Facts Disclosing Jurisdiction.

II.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing an indictment.

The indictment was filed on December 9, 1964. [Clk. Tr. 54.] Prior to that time the government filed another indictment on July 29, 1964. [Clk. Tr. 2.] That indictment was dismissed on November 2, 1964. [Clk. Tr. 53.] In this brief we will refer to the prior indict-

ment (filed on July 29, 1964) as the "first indictment," and to the indictment now under consideration (filed on December 9, 1964) as the "second indictment".

The first indictment was in three counts. It charged as follows:

COUNT ONE alleged that appellees Root and Forde had conspired with John William Irwin, Joseph Clyde Amsler and Barry Worthington Keenan to obstruct justice and commit perjury in Case No. 33087-CD by having Irwin and Amsler testify falsely. [Clk. Tr. 2-5.] Case No. 33087 was the Frank Sinatra, Jr., kidnapping case. Irwin, Amsler and Keenan were the defendants. Root was the attorney for Irwin, and Forde was the attorney for Amsler.

COUNT TWO alleged that Root and Forde did obstruct justice by having Amsler commit perjury in the kidnapping case. [Clk. Tr. 6.]

COUNT THREE was identical to Count Two except that it alleged that Irwin had been induced to commit perjury. [Clk. Tr. 7.]

Root moved to dismiss the first indictment [Clk. Tr. 8-11.] At the first hearing on October 12, 1964, Forde joined in the motion. The court dismissed Counts Two and Three (obstruction of justice by suborning perjury) on the theory that they, in effect, charged subornation of perjury and were deficient because they did not allege what the claimed false testimony was. The hearing on the motion as to Count One (conspiracy to obstruct justice and commit perjury) was continued to November 2, 1964, so that briefs could be filed with respect to the question of whether the same rule of pleading applies to a conspiracy

count.¹ Briefs were filed on this point. [Clk. Tr. 17-38, 47-51, 40-46.] On November 2, 1964, Count One was dismissed on the ground that it did not allege the false testimony. [Clk. Tr. 53.] The government did not appeal from the order dismissing the first indictment, and it is now final.

The second indictment is in five counts. It charges as follows:

COUNT ONE of the second indictment is, for all practical purposes, the same as Count One of the first indictment. [Compare: Clk. Tr. 2-4 and Clk. Tr. 55-59.] It alleges a conspiracy to obstruct justice, commit perjury and suborn perjury. The only differences are that subornation of perjury is added and six general subject matters are listed concerning which Irwin and Amsler were to give false testimony. As with the first indictment, the second indictment does not allege the claimed false testimony. [Clk. Tr. 54-59.]

COUNT TWO alleges subornation of perjury with respect to Amsler. It sets forth approximately seventy pages of Amsler's testimony at the kidnapping trial, and alleges that some of the testimony was false. [Clk. Tr. 60-129.] The pattern is to quote several pages of the transcript, and then allege that "said testimony was false . . . in that. . . ." Then will follow a brief statement of what the government contends is true. [Clk. Tr. 129.] The reader is left with the task of going back through the transcript and trying to figure out what portions of the testimony, if any, contradict the government's contention. There is also a general allegation that "said testimony was material to the issues of guilt

¹See: Reporter's Transcript, October 12, 1964.

or innocence.” [Clk. Tr. 129.] It is not alleged how or why the testimony was material. In many cases it is impossible to understand the claim of materiality. For example, in one place the government alleges that the truth of the matter was that “when Amsler’s attorney told Amsler to ‘cooperate fully with the FBI’ that did not mean to Amsler that he would make believe it was a real crime when in truth and in fact it wasn’t.” [Clk. Tr. 129.] What Amsler’s attorney told him and what Amsler understood, all after the crime was committed, was not material to the issues of the case.

COUNT THREE is the same as Count Two except that it recites Irwin’s testimony. [Clk. Tr. 130-199.]

COUNT FOUR is the same as Count Two of the first indictment. [Compare: Clk. Tr. 6 and Clk. Tr. 199.] It alleges obstruction of justice by having Amsler testify falsely. The only difference is that the general subject matters stated in Count One are repeated.

COUNT FIVE is the same as Count Four except that it relates to Irwin. [Clk. Tr. 201.]

Both appellees moved to dismiss the second indictment. [Clk. Tr. 202-214, 215-231.] As to Counts One, Four and Five (conspiracy and obstruction of justice) the same grounds were urged as had been raised with respect to Counts One, Two and Three of the first indictment. [Compare: Clk. Tr. 28-35 and Clk. Tr. 204-210, 213.] Counts Two and Three of the second indictment (subornation of perjury) were new. The grounds in support of the motions to dismiss these Counts were that: (1) it is not alleged that the defendants knew that the witnesses knew their testimony was false; (2) materiality is not sufficiently alleged; (3) it cannot be

determined which portions of the quoted testimony of the witnesses were claimed to be false. [Clk. Tr. 211-212; 223-228.]² The motions were granted, and this appeal followed. [Clk. Tr. 286-288; 291-292.]

III.

SUMMARY OF ARGUMENT.

Counts One, Four and Five of the second indictment do not state an offense because they do not set forth the alleged false testimony. Count One charges a conspiracy to commit perjury. Counts Four and Five charge obstruction of justice by suborning perjury. In either case, perjury or subornation of perjury, it is essential to allege the testimony of the witness that it claimed to be false. It is not sufficient to allege only general subject matters that the witness testified about.

The dismissal of Counts One, Four and Five of the second indictment was also required under the rule of *res judicata*. These Counts are no different in principle from Counts One, Two and Three of the first indictment. The first count of each indictment alleged a conspiracy to suborn perjury with respect to certain subject matters. The first indictment was dismissed on the ground that the false testimony must be set forth. The government did not appeal from the dismissal of the first indictment. That order was and is a final judgment. The issue of law which it determined is *res judicata* between these parties.

²There were additional grounds asserted by appellee Root in support of her motion. [Clk. Tr. 215.] The trial court specifically rejected these points and based its ruling on the grounds set forth above. [Clk. Tr. 288.] This does not preclude consideration of those grounds on this appeal. *United States v. Meyer* (5th Cir. 1959), 266 F. 2d 747, 756.

Counts Two and Three of the second indictment are new allegations. They allege subornation of perjury, and they quote approximately 140 pages of testimony of the witnesses. But these Counts are deficient for three reasons: (1) It is not alleged that the defendants knew that the witnesses knew their testimony was false; (2) the portions of the testimony claimed to be false are not specified; (3) the materiality of the testimony is not shown.

IV.

ARGUMENT.

A. Counts One, Four and Five of the Second Indictment Do Not State an Offense Because They Do Not Set Forth the Alleged False Testimony.

Count One alleges a conspiracy to suborn and commit perjury.³ [Clk. Tr. 54-59.] The alleged false testimony is not set forth in Count One. It is charged only that Amsler and Irwin would be instructed to and would testify falsely on certain subjects, namely, “that Frank Sinatra, Jr., knew beforehand that he was to be kidnapped”; “that the kidnapping of Frank Sinatra, Jr., was planned by people ‘higher up’ than Barry W. Keenan”; “that the kidnapping of Frank Sinatra, Jr., was a publicity stunt and a hoax”; that there was a person named ‘Wes’ or ‘West’ who was involved in planning the kidnapping of Frank Sinatra, Jr.”; “that they were to be caught by law enforcement personnel”; “that once they were caught they would conduct themselves as if they had really kidnapped Frank

³Count One also alleges that it was an object of the conspiracy to obstruct justice. However, the only method of obstructing justice that is alleged is perjury, and the government’s brief discusses only the perjury allegations. (App. Op. Br. 14-21.)

Sinatra, Jr., and not reveal that it was a hoax and publicity stunt". [Clk. Tr. 57.]

Counts Four and Five allege obstruction of justice by suborning perjury. Count Four says that Amsler was induced to give false testimony. Count Five makes identical allegations for Irwin. Neither Count sets forth the claimed false testimony. Both Counts repeat the subject matters of Count One as to which the witnesses assertedly testified falsely in some unspecified manner. [Clk. Tr. 198-201.]

This method of attempting to plead perjury by reference to subject matters is not sufficient. The reason it is not sufficient is the fundamental principle that the accused must be notified by the indictment of what it is that he is accused of doing. In the case of some crimes, adequate notice is not given by pleading in the generic or general terms of the statute. Perjury is one of those crimes. In a perjury case the accused must be confronted in the indictment with the false words. Otherwise the defendant cannot tell what it is, that is what part of the testimony it is, that he is going to be called upon to defend. It does no good to say that testimony was false with respect to a subject matter or even with respect to a specific fact. In any case a witness can and generally always does say many different things relating to a subject or fact when examined and cross-examined about it. If the defendant is told only that something is false about what he said he is left to guess what that something is. Another and more serious vice of the subject matter pleading is that it does not say what is true or false about the subject matter. Suppose the indictment charged that the defendant testified falsely (or suborned a witness to testi-

fy falsely) on the subject matter "that the car was blue". What does that mean? Is it claimed that the car was blue and therefore that anything said tending to show it was not blue was false? Or does it mean the opposite—that any testimony indicating it was blue was false? It is no different to say that there was false testimony on the subject: "that Frank Sinatra, Jr., knew beforehand that he was to be kidnapped". What is the charge? Is it that Frank Sinatra, Jr., did know, or is it that he did not know? The answer to this question is not alleged one way or the other in Counts One, Four and Five of the second indictment.

Suppose this had been set forth, *i.e.*, assume an allegation either that the subject matter was true or that it was false. The defendant would then know the government's contention as to the truth of the subject matter. But that still does not tell him what the claimed false testimony is. What is it that was said indicating Frank Sinatra, Jr., knew beforehand, etc., that is claimed to be a false statement? This is not an academic problem. In this case the witnesses may have and probably did testify to over 100 separate facts bearing on the issue of Frank Sinatra, Jr.'s knowledge. It would be a most difficult task to even ferret out all of the relevant parts of the testimony. Even if that could be done, the defendant would be no better off. He would still not know what parts of this maze are going to be relevant to the perjury case. There is no substitute for the rule that when perjury is charged the indictment must set forth the alleged false testimony. If perjury is pleaded in the generic terms of the statute, *i.e.*, "the defendant testified falsely in a case", the indictment says nothing. If the indictment goes no further than to say that the

defendant testified falsely on or concerning a subject or fact in a case, it says no more.

The cases support the rule we advocate. In *Russell v. U. S.* (1962), 369 U.S. 749, 765-766, 8 L. Ed. 2d 240, 82 S. Ct. 1038, the Supreme Court reiterated the fundamental principle that an indictment must inform the defendant of what it is that he is accused of. It is not sufficient to merely say that the defendant committed some specified crime by pleading only the statutory elements of the offense. The indictment must notify the defendant of the operative facts he is accused of which constitute the crime. This basic requirement of pleading in criminal cases has not been watered down by the modern rules of procedure which permit and require simplified pleading. 369 U.S. at 765-766:

“ ‘It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, ‘includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.’ *United States v. Cruikshank*, 92 US 542, 558, 23 L ed 588, 593. An indictment not framed to apprise the defendant ‘with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.’ *United States v Simmons*, 96 US 360, 362, 24 L ed 819, 820. ‘In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the

elements necessary to constitute the offense intended to be punished; . . .' *United States v. Carll*, 105 US 611, 612, 26 L ed 1135. 'Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.' *United States v. Hess*, 124 US 483, 487, 31 L ed 516, 518, 8 S Ct 571. See also *Pettibone v. United States*, 148 US 197, 202-204, 37 L ed 419, 422, 423, 13 S Ct 542; *Blitz v. United States*, 153 US 308, 315, 38 L ed 725, 727, 14 S Ct 924; *Keck v. United States*, 172 US 434, 437, 43 L ed 505, 507, 19 S Ct 254; *Morissette v. United States*, 342 US 246, 270, note 30, 96 L ed 288, 304, 72 S Ct 240. Cf. *United States v. Petrillo*, 332 US 1, 10, 11, 12, 91 L ed 1877, 1884, 1885, 67 S Ct 1538. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.¹³⁹

In making the above statement in the *Russell* case, the Supreme Court cited three District Court cases: *United States v. Simplot* (D.C. Utah), 192 F. Supp. 734; *United States v. Devine's Milk Laboratories* (D. C. Mass.), 179 F. Supp. 799; *United States v. Apex Distributing Co.* (D.C.R.I.), 148 F. Supp. 365.⁴ On their facts, these cases are determinative of the point now under consideration. In *United States v. Simplot*

⁴See: Footnote 13, 369 U.S. at 766.

(D.C. Utah 1961), 192 F. Supp. 734, *supra*, the indictment charged perjury as follows (192 F. Supp. at 735):

“The Grand Jury charges:

“That on or about February 8, 1960, J. R. Simplot, having taken an oath before the United States District Court for the District of Utah in a case being heard in that court, to wit, Archer vs. J. R. Simplot Company, Civil No. C-31-58, in which case the law of the United States authorized an oath to be administered, that he would testify truly, willfully and contrary to such oath stated and testified to a material matter which he did not believe to be true, said testimony was to an alleged conversation between himself and John Archer in Sun Valley, Idaho, in the spring of 1954, concerning the termination of their business relationship, in violation of Section 1621, Title 18, United States Code.”

The *Simplot* indictment, in respect of its allegation of perjury, was no different in principle from Counts One, Four and Five of the indictment now under consideration. In *Simplot* the charge was that in a certain case the defendant testified falsely to a material matter, namely, “. . . to an alleged conversation between himself and John Archer in Sun Valley, Idaho, in the spring of 1954, concerning the termination of their business relationship”. The indictment now under consideration is even less specific. It says, for example, that Irwin and Amsler testified falsely on the subject “that Frank Sinatra, Jr., knew beforehand that he was to be kidnapped”. The indictment in the *Simplot* case was dismissed on the specific ground that it was not

sufficient to allege only the subject matter with respect to which false testimony was allegedly given. 192 F. Supp. at 737:

“Does the additional allegation contained in the indictment in question cure what otherwise would be a fatal deficiency?:

‘* * * said testimony was to an alleged conversation between himself and John Archer in Sun Valley, Idaho, in the spring of 1954 concerning the termination of their business relationship * * *.’

Stated another way, does a statement of the general subject matter of allegedly false testimony, with no indication whatsoever as to its substance, tenor or direction satisfy the requirements of the Constitution and of the rule? In the context in which the problem is presented here, I do not think that it does. The court is left to speculate as to the intent or substance of any testimony claimed to have been false and the only fact which the defendant now knows, or which another court in considering a plea of res judicata would know, is that sometime during the day referred to in the indictment the defendant is claimed to have testified under oath falsely about something in some way relating to an alleged conversation between himself and John Archer in Sun Valley, Idaho, in the spring of 1954 touching upon the termination of their business relationship. It may be that the Government may know what is meant to be referred to as the false statement or statements. If so, it would seem simple to frame a proper indictment. This has not been done.”

The other two cases cited in *Russell v. U.S.* are: *United States v. Devine's Milk Laboratories* (D.C. Mass. 1960), 179 F. Supp. 799, and *United States v. Apex Distributing Co.* (D.C.R.I. 1957), 148 F. Supp. 365, *supra*. The significance of these cases is that they were conspiracy cases. In *United States v. Devine's Milk Laboratories* the indictment charged a conspiracy to ". . . make . . . false statements in matters within the jurisdiction of the Department of the Army . . .". In *United States v. Apex Distributing Co.* the indictment also alleged a conspiracy to make false statements. In both cases it was held that the indictments were insufficient because they did not allege what the false statements were.

All of the cases which the government cites in its brief are either not in point or they are *contra* to and cannot be reconciled with the rule announced by the Supreme Court in the *Russell* case. Following is a discussion of all cases cited in the government's brief in respect of Counts One, Four and Five:⁵

United States v. Falcone (1940), 311 U.S. 205, 8 L. Ed. 128, 61 S. Ct. 204. (App. Op. Br. 14.) This was not a perjury or false statement case. It involved a conspiracy to operate illicit stills in violation of the revenue laws. It was held that the evidence was sufficient to warrant a conviction. The sufficiency of the indictment was not questioned.

⁵This discussion of the government's cases does not include certain cases which the government does not rely upon in support of its position. These are: *Russell v. U.S.* (1962), 369 U.S. 749, 8 L. Ed. 2d 240, 82 S. Ct. 1038, App. Op. Br. 16, 19, 20; *United States v. Devine's Milk Laboratories* (D.C. Mass. 1960), 179 F. Supp. 799, App. Op. Br. 19; *United States v. Apex Distributing Co.* (D.C.R.I. 1957), 148 F. Supp. 365, App. Op. Br. 19; *Pettibone v. U.S.* (1893), 148 U.S. 197, 37 L. Ed. 419, 13 S. Ct. 542, App. Op. Br. 20, 21.

Blumenthal v. U. S. (9th Cir. 1946), 158 F. 2d 883, affd. 332 U.S. 539, 92 L. Ed. 154, 68 S. Ct. 248. (App. Op. Br. 14.) This case involved a conspiracy to sell liquor over ceiling prices in violation of OPA regulations. It was contended that the indictment did not state an offense on the theory that there cannot be a violation under the general conspiracy statute because the Emergency Price Control Act makes it unlawful to agree to violate price regulations. This claim was rejected. The sufficiency of the indictment to allege a conspiracy was not attacked.

Brown v. U. S. (8th Cir. 1906), 143 Fed. 60. (App. Op. Br. 16.) This was a mail fraud case. Mail fraud is, in effect, a conspiracy to defraud in that it requires a "scheme or artifice to defraud." The indictment was attacked and held sufficient. But it apparently alleged the scheme in detail. The indictment is not set forth in the opinion. The court's description of the indictment indicates that it did allege what the false representations were. (143 Fed. at 63.)

Smiley v. U. S. (9th Cir. 1950), 181 F. 2d 505. (App. Op. Br. 16.) The indictment in this case charged that the defendant on three separate occasions represented to three different named law enforcement officers that he was a United States citizen, whereas he was not. It is a crime for an alien to represent to anyone that he is a citizen. 8 USCA 746. The indictment was held sufficient. What else could it say? This case is not in point. Counts One, Four and Five of the second indictment now under consideration do not say that Irwin or Amsler represented or said "that Frank Sinatra, Jr., knew beforehand that he was to be kidnapped". It is

only alleged that they agreed to and did say something false in respect of that subject.

Wong Tai v. U. S. (1927), 273 U.S. 77, 71 L. Ed. 545, 47 S. Ct. 300. (App. Op. Br. 16, 17.) This case involved a conspiracy to import and sell opium. The indictment set forth the dates on which the opium was imported, the name of the ship it was imported on, and the number of sacks of opium in each shipment. The *Wong Tai* case is not relevant to the question of whether it is necessary to allege the false testimony in a perjury indictment.

United States v. Chunn (4th Cir. 1965), 347 F. 2d 717. (App. Op. Br. 16.) This case has no application. It did not involve perjury or conspiracy. It was an assault and battery case. The indictment charged that on a specified date the defendants assaulted a named federal officer "by pointing and firing a deadly weapon, that is, a small caliber rifle, and beating, striking, whipping and stomping the said Charles Boler, Jr."

Stapleton v. U. S. (9th Cir. 1958), 260 F. 2d 415. (App. Op. Br. 16.) The indictment in this case charged that the defendant stole certain specified tools and equipment belonging to B. C. Mica Mines, Ltd. "with intent to deprive the said owner thereof". The argument was that the indictment should have said that the taking was without the consent of the owner. The court held that this was implicit in the words quoted.

United States v. Rabinowitz (1915), 238 U.S. 78, 59 L. Ed. 1211, 35 S. Ct. 682. (App. Op. Br. 17.) The indictment here alleged a conspiracy to conceal assets in bankruptcy. The point decided was that, although only a bankrupt can commit the offense of con-

cealing assets, other persons can be guilty of conspiring with the bankrupt to do this.

American Tobacco Co. v. U.S. (1946), 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125. (App. Op. Br. 17.) This was an anti-trust case. The indictment is not fully set forth in the opinion, and its sufficiency was not questioned or discussed.

Hagner v. U.S. (1932), 285 U.S. 427, 76 L. Ed. 861, 52 S. Ct. 417. (App. Op. Br. 17) This was a mail fraud case. The details of the scheme and artifice to defraud were alleged, but are not set forth in the opinion. The problem in the case was that there was only one mailing, and it was alleged that the envelope was deposited in a post office in Pennsylvania addressed to Washington, D.C. The statute requires that the defendant "cause to be delivered by mail". The defendant argued that the indictment was defective because it did not allege delivery. The court held that there is a presumption of delivery from mailing.

United States v. Debrow (1953), 346 U.S. 374, 98 L. Ed. 92, 74 S. Ct. 113. (App. Op. Br. 17, 33.) This was a perjury case. The only point discussed was whether it is necessary to allege the name of the person who administered the oath. The indictment did allege the false testimony. (See: Opinion of Court of Appeals, 203 F. 2d at 702-703, n. 1.)

Stein v. U.S. (9th Cir. 1962), 313 F. 2d 518. (App. Op. Br. 17.) This case involved a conspiracy to receive, conceal and transport illegally imported heroin. It was not alleged that the defendants knew the heroin had been illegally imported. The court held the indictment sufficient because heroin cannot be imported legally.

Williamson v. U.S. (1907), 207 U.S. 425, 52 L. Ed. 278, 28 S. Ct. 163. (App. Op. Br. 20) This case was a conspiracy to suborn perjury. But it does not support the government's position. The indictment specifically stated the exact false statement which people would be suborned to make. 207 U.S. at 448:

“ . . . the object of the conspiracy is stated to be the suborning of a large number of persons to go before a named person, stated to be a United States commissioner of the district of Oregon, and, in proceedings for the entry and purchase of land in such district under the timber and stone acts, make oath before the official that the lands ‘were not being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not directly or indirectly made any agreement, or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should enure in whole or in part to the benefit of any person except themselves, . . .’ ”

Counts One, Four and Five of the second indictment now under consideration do not say it was a part of the conspiracy that Irwin and Amsler would make or that they were suborned to make any particular statement. It is alleged, for example, that they would testify falsely on the subject that “Frank Sinatra, Jr., knew beforehand that he was to be kidnapped”. Nothing is alleged as to what they would say about this. It is not even stated whether they would say Frank Sinatra, Jr., did know or that he did not know. There is no

comparison between this and the *Williamson* case where the exact false statement was specifically set forth.

Craig v. U.S. (9th Cir. 1936), 81 F. 2d 816. (App. Op. Br. 20.) The government cites this case as involving a "similar" conspiracy pleading. It is not similar. The indictment in the *Craig* case charged a conspiracy to obstruct justice by trying to get a case dismissed by bribing government officials and exercising political influence. Every detail of the plan was set forth. The court said (81 F. 2d at 821):

"... the count in question descends to almost tedious minutiae in detailing the terms of the conspiracy."

Turf Center, Inc. v. U.S. (9th Cir. 1963), 325 F. 2d 793 (App. Op. Br. 20.) This was not a conspiracy or perjury case. The charge was using an interstate facility (telegraph) to carry on a gambling business.

United States v. Perlstein (3rd Cir. 1942), 126 F. 2d 789. (App. Op. Br. 21.) This case involved a conspiracy to obstruct justice, and one of the means of obstructing justice was subornation of perjury. The case does not support the government's position for two reasons: (1) The sufficiency of the allegations of perjury were not discussed or decided. (2) The indictment did set forth what it was that the witnesses would be suborned to say. The witnesses would be told not to identify the defendants, and they would be told to deny that the defendants had anything to do with a still. (The case in which the witnesses were to be called involved operation of an illegal still.)

Roberts v. U.S. (9th Cir. 1956), 239 F. 2d 467. (App. Op. Br. 34, 35, 38.) This case involved both per-

jury and obstruction of justice by attempting to suborn perjury. But the false statements were set forth. The first count said the defendant committed perjury by falsely testifying that he had made a certain written contract. The second count alleged that he tried to get a witness to say falsely that she had seen the contract.

Catrino v. U.S. (9th Cir. 1949), 176 F. 2d 884. (App. Op. Br. 34.) This case was similar to the *Roberts* case. One count charged subornation of perjury; another was for obstructing justice by suborning the same witness to commit the same perjury. In each count the false testimony was fully alleged.

Segal v. U.S. (8th Cir. 1957), 246 F. 2d 814. (App. Op. Br. 36.) This was a subornation of perjury case, but again the false testimony was alleged in the indictment. The indictment is not set out in the opinion, but the court says there were nine paragraphs dealing with separate subject matters and each paragraph alleged the testimony claimed to be false.

United States v. Straitiff (D.C. Pa. 1953), 14 F.R.D. 337. (App. Op. Br. 37.) The defendant, who was the cashier of a bank, was charged with taking cash from the bank. Rule 7(c) of the Federal Rules of Criminal Procedure provides that an indictment may allege that "the means by which the defendant committed the offense are unknown". The defendant contended that the indictment was defective because it did not say this, *i.e.*, that the means were unknown. The court held that this provision of Rule 7(c) is permissive and not mandatory.

Anderson v. U.S. (6th Cir. 1954), 215 F.2d 84. (App. Op. Br. 37.) The indictment in this case alleged obstruction of justice in that the defendants agreed to

“alter the testimony” of certain witnesses. In so far as appears from the opinion, the manner in which the testimony was to be altered was not set forth. But the allegations of the indictment are not fully set forth in the opinion. At 215 F. 2d, page 85, the court quotes the portion of the indictment which is quoted in the government’s brief. (App. Op. Br. 38-39, n. 13.) At 215 F. 2d, page 87, n. 1, the court refers to another portion of the indictment in quoting from the jury instructions. There it is said that the defendants accepted money in consideration of their agreement. This aspect of the indictment is not contained in the portion quoted on page 85 of the opinion. In other words, you cannot tell from reading this case what all of the allegations of the indictment were. Also, this case does not discuss the point now under consideration. There is no discussion of the problem of having to set forth the false testimony in the indictment.

United States v. Solow (D.C.S.D.N.Y. 1956), 138 F. Supp. 812. (App. Op. Br. 38.) This case is easily distinguishable. The obstruction of justice charged was destruction of certain specified records which were material evidence in a grand jury investigation.

Parsons v. U.S. (5th Cir. 1951), 189 F. 2d 252. (App. Op. Br. 38.) In this case the charge was obstruction of justice by bribing a witness. The allegations of the indictment are not set forth in the opinion. The only point decided with respect to sufficiency of the indictment is that it is not necessary to allege that the defendant knew that the person he bribed was or would be a witness.

Hicks v. U.S. (4th Cir. 1949), 173 F. 2d 570. (App. Op. Br. 38.) This was a case of bribing a juror.

The indictment is not set out in the opinion, and the court does not indicate in any way what the allegations of the indictment were.

Nye v. United States (4th Cir. 1943), 137 F. 2d 73. (App. Op. Br. 38.) This case is either distinguishable on the ground that a different rule applies when the defendant is charged with using a false writing, as distinguished from making or causing another to make a false oral statement; or it is *contra* to the *Russell* case and impliedly overruled. In *Nye v. United States* the defendant was charged in one count with obstructing justice by fraudulently obtaining false letters and affidavits which he used to try to get a case dismissed. The false documents were specifically described in another count of the indictment. The court noted that the description of the documents in one count could not be used to aid the other because not incorporated by reference. The count which did not specifically describe the documents was nevertheless held sufficient. This case cannot be reconciled with *United States v. Devine's Milk Laboratories* (D.C. Mass. 1960), 179 F. Supp. 799, which was cited with approval by the Supreme Court in *Russell v. United States* (1962), 369 U.S. 749, 766, 8 L. Ed. 2d 240, 82 S. Ct. 1038. In *Devine's Milk Laboratories* the indictment charged a conspiracy to make and present false, fictitious and fraudulent claims to the Department of the Army. The indictment was held insufficient for failure to specify what the claims were. There is also this distinction. In *Devine's Milk Laboratories*, as in the instant case of Root and Forde, the sufficiency of the indictment was being tested by motion before trial. In the *Nye* case, and in all other cases we have read where

a liberal rule of pleading was allowed, the attack on the indictment was after trial and it was conceded that the deficiencies of the indictment did not prejudice the defendant in his defense.

Seawright v. United States (6th Cir. 1955), 224 F. 2d 482. This was not a subornation of perjury situation. The indictment charged that the defendant endeavored to "influence, intimidate and impede" a witness. It was not alleged that the object of the endeavor was to induce the witness to testify falsely. The only objection made to the indictment was that it should have been alleged that the endeavor was "corrupt" and that the witness was impeded "in the discharge of her duty."

Cole v. United States (9th Cir. 1964), 329 F. 2d 437. This case is distinguishable for two reasons: (1) no attack was ever made on the indictment, either in the trial court or in the court of appeals. (2) *Cole* did not involve false testimony. The indictment charged that the defendant endeavored to influence, intimidate and impede a witness "in connection with certain testimony he might give." But everyone knew that the sole operative fact involved was that Cole had induced Benton to take the Fifth Amendment when he appeared before the grand jury. The only issues in the *Cole* case were the manner in which Cole induced Benton and whether it could be a crime to induce taking the Fifth Amendment. This has no similarity to the case now under consideration. Counts One, Four and Five of the second indictment charge that the defendants conspired to have Irwin and Amsler give false testimony and that the defendants did induce Irwin and Amsler to give false testimony. In this posture it is essential to

allege what the claimed false testimony is. This is not alleged, and these counts are deficient for that reason.

The government's argument in defense of these counts is that in either case (conspiracy to suborn perjury or obstruction of justice by suborning perjury) it is not necessary that the unlawful agreement or endeavor be accomplished. The defendants could be held guilty of conspiracy or endeavor to obstruct justice even though the witnesses never took the stand. Therefore, says the government, how can they be expected to allege the false testimony when there might be cases where there is no false testimony? (App. Op. Br. 16-17, 34-35.) There are two answers to this argument.

First. The case the government supposes is not presented here. Irwin and Amsler did take the witness stand, and according to the indictment they did give false testimony.

Second. If the hypothetical situation proposed by the government were presented, it would still be necessary to allege the proposed false statements. Stated another way, there would be no crime unless the defendants agreed to induce the witnesses to say something. Surely it would not be criminal to agree "to suborn perjury" with no discussion or understanding of what was to be said. This would not be an agreement to do anything. In any event, this situation is not presented. The witnesses took the stand and testified. The government claims they testified falsely, and it is incumbent upon the government to allege in the indictment what the claimed false testimony is.

The government also says the defendants were defense attorneys in the Frank Sinatra, Jr., kidnapping

case and therefore knew all of the details of the case. (App. Op. Br. 18.) This, of course, has nothing to do with the question of whether the allegations of the indictment are sufficient. Beyond that, it is no answer to the real and practical necessity of informing a defendant in a perjury case of what the claimed false testimony is. Of course the defendants are familiar with the case, and they can inform themselves of all of the testimony by reading the transcript. But there is no way they can know what parts of the testimony are claimed by the government to be false unless the government informs them of its contentions in the indictment.

B. The Dismissal of Counts One, Four and Five of the Indictment Was Required Under the Rule of Res Judicata.

Counts One, Four and Five of the second indictment are no different in principle from Counts One, Two and Three of the first indictment. The only thing added by the second indictment is a list of six subject matters concerning which Irwin and Amsler would and did give false testimony. In neither indictment is it specified what the false testimony is. The first indictment was dismissed on the ground that it was insufficient because it did not allege the false testimony. The government did not appeal from the dismissal of the first indictment. That judgment is final. Under the rule of *res judicata* the issue of law which it decided cannot now be reopened. The dismissal of the first indictment determined that the government must plead the alleged false testimony. The government is now estopped to contend otherwise.

We are not here contending that the dismissal of the first indictment is a complete bar to reindictment for the same crime. The point we now make is that even if reindictment is permissible, the effect of the prior dismissal nevertheless operates as a final determination between the parties of any issue of fact or law which it decided.

In *United States v. Oppenheimer* (1916), 242 U.S. 85, 87, 61 L. Ed. 161, 37 S. Ct. 68, the first indictment for conspiracy to conceal assets in bankruptcy was dismissed on the ground that the statute of limitations had run. It was subsequently decided by the Supreme Court in *United States v. Rabinowich* (1915), 238 U.S. 78, 59 L. Ed. 1211, 35 S. Ct. 682, that the statute would not be a defense. The defendant was reindicted. The statute of limitations was no longer a defense. But it was held that as to this defendant and as to this crime the prior determination was *res judicata*.

In *United States v. DeAngelo* (3rd Cir. 1943), 138 F. 2d 466, the defendant was indicted for robbery and conspiracy to commit the same robbery. He was tried first for the substantive offense and acquitted. This was not a bar to trial of the conspiracy because it is a separate offense. However, in proving the conspiracy it was necessary to show that the defendant was present at the scene of the robbery. The court held that this issue was necessarily determined in favor of the defendant at the prior trial and so was *res judicata*.

In *Stroud v. U.S.* (10th Cir. 1960), 283 F. 2d 137, the defendant was tried for murder three times. On each trial he was convicted and appealed. On one of the appeals he argued that the subsequent trials and con-

victions were invalid because of double jeopardy. The question was decided against him. Later he moved to vacate the sentence, raising the same ground of double jeopardy. The court held that this issue was *res judicata*.

See also: *United States v. Salvatore* (D.C.E.D. Pa. 1956), 140 F. Supp. 470; *Wheatley v. U.S.* (10th Cir. 1961), 286 F. 2d 519; *United States v. Rangel-Perez* (D.C.S.D. Calif. 1959), 179 F. Supp. 619.

C. Counts Two and Three of the Second Indictment Do Not State an Offense Because It Is Not Alleged That the Defendants Knew That the Witnesses Knew Their Testimony Was False, the Portions of the Testimony Claimed to Be False Are Not Specified, and the Materiality of the Testimony Is Not Shown.

1. It Is Not Alleged That the Defendants Knew That the Witnesses Knew Their Testimony Was False.

There are three types of knowledge required for subornation of perjury: (1) The defendant must know the testimony is false; (2) the witness must know the testimony is false; (3) the defendant must know that the witness knows the testimony is false. If any one of the three is lacking there is no subornation of perjury. If the defendant believes in the truth of the testimony he does not suborn perjury even if the witness commits perjury. If the witness believes in the truth of the testimony there is no perjury, and there can be no subornation of perjury even if the defendant thinks the testimony is false. So also, if the defendant thinks the witness is under the impression that he is telling the truth, there is no subornation even if both of them know the testimony is false.

United States v. Evans (D.C. Calif. 1884), 19 Fed. 912:

“The indictment, after the usual formal allegations, which seem to be quite sufficient, charges in substance that the defendant procured one Burnett to commit the crime of perjury by swearing to certain allegations contained in an affidavit made and subscribed by him on an application for an entry of certain timber lands. It avers that Burnett knew that these allegations were false, and it negatives them by averring what the facts were. It also avers that the defendant, when he procured Burnett to swear to these allegations, also knew that they were false. It does not aver that he knew that Burnett was aware of their falsehood. To sustain an indictment for procuring a person to commit perjury it is obviously necessary that perjury has in fact been committed. It cannot be committed unless the person taking the oath not only swears to what was false, but does so willfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person who is to swear to them knows them to be false; for unless the witness has that knowledge the intent to swear falsely is wanting, and he commits no perjury. It is therefore essential that the indictment should aver, not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus the crime of perjury would be committed by him.”

The most that can be said of Counts Two and Three of the second indictment is that it is alleged that the defendants and the witnesses knew the testimony was false. The third element of knowledge of the witness' knowledge is entirely lacking.

The government attempts to justify its failure to make this allegation by saying, in effect, that it may be implied from the recital that the defendants "knowingly procured the witnesses to knowingly commit perjury". (App. Op. Br. 25.) The fact that this cannot be implied from the quoted language is illustrated in one of the cases cited by the government. In *Ryan v. U.S.* (7th Cir. 1932), 58 F. 2d 708, the indictment used almost the identical language now relied upon by the government. It was alleged that the "appellant and Joseph D. Hopewell did willfully, knowingly, and corruptly suborn, instigate, and procure May V. Pearson to willfully, knowingly, feloniously and corruptly testify. . . .". (58 F. 2d at 708.) But the pleader added also the following allegation, which is essential: ". . . and at the time she gave it, she, as well as appellant and Hopewell, knew that it was false, and appellant and Hopewell knew that she knew it was false . . .". (58 F. 2d at 709.)

2. The Portions of the Testimony Claimed to Be False Are Not Specified.

Counts Two and Three of the second indictment set forth approximately 140 pages of testimony of the witnesses Irwin and Amsler. We therefore do not claim that these counts of the indictment are deficient for failure to allege the testimony. Our argument is that the indictment does not adequately notify the defend-

ants of the portions of the testimony that are claimed to be false.

The pattern of the indictment is to quote from the transcript for several pages and then say that certain things about it are false. The problem is that it is next to impossible to figure out the claims of falsity. Take, for example, the first specification of perjury. [Clk. Tr. 61-71.] The first ten pages quote Amsler's testimony about a conversation with Keenan. According to Amsler, Keenan told him about the plan for the kidnapping, and Keenan showed him a thirty or forty-page folder outlining the plan. In discussing the plan, Keenan tells Amsler, among other things, that Frank Sinatra, Jr., is to know about it beforehand. Then comes the claim of falsity. The government says: "At said time and place, mid-October, 1963, at Castellammare, Los Angeles, California, Barry W. Keenan did not tell Joseph Clyde Amsler that the person that was to be the victim [Frank Sinatra, Jr.] of this 'operation' was to know of it beforehand;" [Clk. Tr. 17, lines 17-21.] A statement to this effect can be found in Amsler's testimony. [Clk. Tr. 12, lines 3-4.] But this statement which the government is apparently referring to does not appear until you have already read through four pages of testimony which precede it. You then begin to wonder what exactly it is that the government claims was false testimony. Is it only the statement that Keenan told Amsler that Frank Sinatra, Jr., would know about it beforehand? Or is it the whole conversation about the kidnapping plan? This doubt about what the government's contention is becomes an abiding conviction after going through this process for 140 legal-size pages. You cannot determine with any degree

of certainty exactly what it is about the testimony of the witnesses that is claimed to be false.

Rule 7(c) of the Federal Rules of Criminal Procedure requires that the indictment be “a plain, concise and definite written statement of the essential facts constituting the offense charged”. Counts Two and Three of the second indictment now under consideration are not in conformity with this rule. This indictment is not plain, concise or definite. It is confusing, verbose and vague.

Judge Hall summed it up as follows in his order [Clk. Tr. 287-288]:

“While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning matters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR.

“Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indictment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representa-

tion of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated."

3. The Materiality of the Testimony Is Not Shown.

Counts Two and Three of the second indictment allege materiality in general terms. At the end of each specification of perjury it is said: "And the above said testimony was material to the issues of guilt or innocence as framed by the indictment and the pleas of not guilty entered by all the defendants in Case No. 33087-CD." [Clk. Tr. 70-71.]

The government cites cases holding that materiality may be alleged generally in a perjury case. (App. Op. Br. 24.) We do not dispute the rule that it is sufficient to allege materiality generally in some cases, *i.e.*, in situations where the testimony is apparently material from reading the indictment. But a different rule applies when the materiality is not apparent.

United States v. Cobert (D.C.S.D. Calif. 1964), 227 F. Supp. 915, illustrates the type of situation where materiality must be shown. That case involved a charge of perjury in testifying before the grand jury. The indictment alleged the testimony and said that it was false and material. But you could not tell from the indictment why it was material because the nature of the inquiry before the grand jury was not disclosed. In dismissing the indictment, Judge Byrne noted and pointed out that in every case where a general allegation of materiality was permitted, the other allegations of the indictment did disclose the pertinency of the testimony.

The case now under consideration is concededly different from a grand jury investigation where the subject of inquiry is unknown. This was a kidnapping case. The subject matter is disclosed. One would expect that all of the evidence admitted at the trial was relevant to whether or not the defendants kidnapped Frank Sinatra, Jr. However, when you read the testimony of Irwin and Amsler that is quoted in Counts Two and Three of this indictment, you not only wonder about its materiality—it seems inconceivable that it was admitted in evidence.

Practically everything that is quoted is something one defendant said to another. Many of these alleged false conversations were after the defendants were arrested and waiting trial. For example, it is said: “. . . at said time and place, January 6, 1964, in the Los Angeles County Jail, Los Angeles, California, there was no conversation wherein Amsler said to Keenan, ‘You told me that we would be out on bail by now, and so far I haven’t heard from anybody. And I’d like to know what’s behind this whole thing.’” [Clk. Tr. 86, lines 25-29.] How could this possibly be material? We must assume that the government has something in mind in claiming that it was pertinent to the issues of guilt or innocence. The fact remains that this specification of perjury is apparently *immaterial* from reading the indictment. The other specifications are similar. In each and every case there is a substantial question as to materiality.

Conclusion.

The second indictment does not state an offense. Counts One, Four and Five are defective for failure to set forth the alleged false testimony. The order dismissing the first indictment is *res judicata* on this point. Counts Two and Three are deficient because they do not allege the defendants' knowledge of the witness' knowledge of falsity. These counts also do not adequately specify what the claimed false testimony is, and they do not show materiality.

The trial judge carefully and repeatedly studied this indictment for several months. He concluded that he could not "conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction."

The judgment is right and should be affirmed.

Respectfully submitted,

BALL, HUNT & HART,
JOSEPH A. BALL,
JOSEPH D. MULLENDER, JR.,
Attorneys for Appellee George A. Forde.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. MULLENDER, JR.

NO. 20360

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GLADYS TOWLES ROOT and GEORGE A. FORDE,

Appellees.

Appeal from the United States District Court
for the Southern District of California
Central Division

BRIEF OF APPELLEE GLADYS TOWLES ROOT

FEB 10 1967

FILED

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IN THE
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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

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GLADYS TOWLES ROOT and GEORGE A. FORDE,

Appellees.

Appeal from the United States District Court
for the Southern District of California
Central Division

BRIEF OF APPELLEE GLADYS TOWLES ROOT

Comes now Gladys Towles Root, the appellee, and in
answer to the government's appeal sets forth as follows.

CONSTITUTIONAL PROVISIONS,
STATUTES AND RULES INVOLVED

The following constitutional provisions, statutes
and rules involved are set forth in Appendix A hereof:
Sixth Amendment to the United States Constitution; Title
18, Section 1503, U.S. Codes; Title 18, Section 1621, U.S.
Codes; Title 18, Section 1622, U.S. Codes; Title 18, Section

3731, U.S. Codes; Rule 7(c), Federal Rules of Criminal Procedure.

OPINION BELOW

The opinion of Judge Peirson M. Hall is set forth in Appendix B hereof.

QUESTIONS PRESENTED

1. Whether an appeal in this case lies exclusively to the Supreme Court of the United States and whether, in view of this fact, the Circuit Court of Appeals lacks jurisdiction in the light of the provisions of Title 18, Section 3731, U.S. Codes.

2. Whether a construction of Rule 7(c), Federal Rules of Criminal Procedure, is a statute within the meaning of Title 18, Section 3731, U.S. Codes, requiring the matter to be appealed directly to the Supreme Court of the United States and whether Rules of Court are construed such statutes in the light of U.S. v. Hvass, 355 US 570, 2 L.ed. 2d 496.

3. Whether a dismissal of a similar indictment in the U.S. District Court, which is not appealed, is res judicata as to a second and superseding indictment.

4. Whether an indictment which is 148 pages in length and weighs several pounds complies with the constitutional provision to inform an accused, the court and the jury of the nature and cause of an accusation or is so

prolix, ambiguous and confusing as to be an unconstitutional construction of the constitutional requirement of the Sixth Amendment.

5. Whether Rule 7(c), Federal Rules of Criminal Procedure, which requires an indictment to be a "plain, concise and definite written statement of the essential facts constituting the offense charged" is violated by a prolix indictment of 148 pages, weighing several pounds, and requires its dismissal.

6. Whether an indictment charging subornation of perjury is fatally defective in failing specifically to point out in plain, simple language just what was false, what was known to the witness who testified to be false and whether the defendant knew that it was false at the time of the alleged subornation and at the time of the testimony.

7. Whether an indictment for subornation of perjury is fatally defective in failing to allege that the defendant knew that the testimony which he influenced the suborned witness to give was false and that in giving such testimony the witness would wilfully and corruptly commit the crime of perjury.

8. Whether an indictment charging subornation of perjury and setting out that the matters were material must specify more than the conclusion that it is material and specify wherein the testimony was and is material so that the court, in the first instance, can determine whether

a crime has been charged and whether the defendant can have the protection on appeal and other proceedings of showing the lack of materiality of the matters alleged to have been suborned testimony.

9. Whether the appellee Root can raise the point as to the systematic exclusion of lawyers from the grand jury which returned the indictment as a violation of her constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States.

10. Whether the appellee Root can raise the point and have the court determine the invalidity of the indictment on the ground that women lawyers were excluded from the grand jury which returned the indictment.

11. Whether the court should strike the government's brief on appeal for non-compliance with the Rules of this court for failure to set out the prolix and lengthy indictment of 148 pages in its opening brief.

THE FACTS

As the government does not delineate all of the matters which are necessary to determine this appeal, we set forth a further statement of the facts in connection with it.

The appellee Gladys Towles Root is an attorney at law, who represented John William Irwin, one of the defendants in the so-called Sinatra kidnaping trial. George Forde, the other appellee, was attorney for Joseph Clyde Amsler. Both Irwin and Amsler are appellants and their appeal to this court in the so-called kidnaping case is pending, being No. 19509.

This is a response to an appeal by the government from an order dismissing a second indictment returned by the grand jury in this case on December 9, 1964. (C.T. 54)

A prior indictment was filed July 29, 1964. (C.T. 2) That indictment was dismissed November 2, 1964. (C.T. 53) No appeal was taken from the dismissal of the first indictment and the judgment of dismissal was and is final in respect to the matters set forth in the first indictment.

The appeal from the dismissal of the second indictment was taken on July 28, 1965. (C.T. 291-292)

The District Court dismissed the second indictment on the grounds that the indictment did not state an offense against the laws of the United States in that the indictment did not comply with Rule 7(c), Federal Rules of Criminal

Procedure, in that it was too lengthy; that it did not specify which false testimony "may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR." (C.T. 287) The court found that the indictment fails to inform the defendants "of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated." (C.T. 287-288)

The notice of appeal was to the Court of Appeals for the Ninth Circuit and not to the Supreme Court of the United States, which appellee contends is the sole court which has jurisdiction from the construction of a rule or a constitutional provision. The language of Judge Hall in his dismissal is clearly within the language of the Sixth Amendment to the Constitution of the United States and involves a construction of that constitutional provision as well as a construction of Rule 7(c), Federal Rules of Criminal Procedure.

SUMMARY OF THE ARGUMENT

The cause is improperly appealed to the Court of Appeals for the Ninth Circuit. Section 3731 of Title 18, U.S. Codes, gives the government a right of direct appeal to the United States Supreme Court in cases involving the construction and interpretation of a constitutional provision or statute of the United States and excludes the Courts of Appeals from jurisdiction of such appeals.

The proper court, therefore, for this appeal is the Supreme Court of the United States and the Circuit Court is without jurisdiction in the matter.

The indictment in this case involves the construction and interpretation of Rule 7(c), Federal Rules of Criminal Procedure, as to whether an indictment of 148 pages, weighing several pounds, is a plain, concise and definite written statement of the essential facts constituting the offense charged.

The appeal by the government involves the construction and interpretation, inherently and as construed and applied in this case, of Rule 7(c), Federal Rules of Criminal Procedure under authority of U.S. v. Hvass, 353 US 570, 2 L.ed.2d 496. The jurisdiction of this appeal is in the Supreme Court of the United States.

The determination of the United States District Court on the first indictment, not appealed from, is the law of the case and is res judicata in this case and it covers

all the counts. The present indictment under appeal, being 148 pages, is neither a plain, concise nor definite written statement of the essential facts constituting the offenses charged. It is prolix, confusing, obscure and fails to inform the defendant and the court and jury of the nature and cause of the offense as required by the Sixth Amendment to the Constitution of the United States. It would also deprive the defendants, if required to be tried under it, of fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

Lawyers, as well as women lawyers, were intentionally excluded from the grand jury which returned the indictment, in violation of the Fifth Amendment to the Constitution of the United States. The striking of the cross-appeal did not bar the raising of this point on behalf of the appellee.

U.S. v. Meyer (5th Cir. 1959), 266 F.2d 747,

756

The indictment failed to point out, in each count thereof, where the testimony was material in the posture of this case. This was essential so the court could determine, in the first instance, whether an offense had been stated against the laws of the United States. The failure to set out and point out the materiality of the alleged perjury also made the indictment fatally defective in failing to state an offense against the laws of the United States.

ARGUMENT

I

AN APPEAL IN THIS CASE LIES EXCLUSIVELY
TO THE SUPREME COURT OF THE UNITED STATES
AND THE CIRCUIT COURT OF APPEALS LACKS
JURISDICTION IN THE LIGHT OF THE PROVISIONS
OF TITLE 18, SECTION 3731, U.S. CODES.

This court lacks jurisdiction to entertain the appeal
because the indictment under submission requires a construc-
tion and interpretation of Rule 7(c), Federal Rules of
Criminal Procedure.

Where the construction and interpretation of a
Rule of Court is involved, similar to a statute, the United
States Supreme Court has jurisdiction on direct appeal.

Title 18, Section 3731, U.S. Codes, states:

"An appeal may be taken by and on behalf
of the United States from the district
courts direct to the Supreme Court of the
United States in all criminal cases in
the following instances:

"From a decision or judgment setting
aside, or dismissing any indictment or
information, or any count thereof, where
such decision or judgment is based upon
the invalidity or construction of the
statute upon which the indictment or

information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Appellee contends that, under the provisions of the foregoing section, this court lacks jurisdiction to entertain the appeal herein.

II

RULE 7(c), FEDERAL RULES OF CRIMINAL PROCEDURE, IS A STATUTE WITHIN THE MEANING OF TITLE 18, SECTION 3731, U.S. CODES, REQUIRING THE MATTER TO BE APPEALED DIRECTLY TO THE SUPREME COURT OF THE UNITED STATES AND RULES OF COURT ARE CONSTRUED SUCH STATUTES IN THE LIGHT OF U.S. v. CHARLES T. HVASS, 355 US 570, 2 L.ED. 2d 496.

The United States Supreme Court has held that a Rule of Court is a statute and the government should bring

its case to the Supreme Court of the United States by direct appeal.

U.S. v. Hvass, 355 US 570, 2 L.ed.2d 496,
78 S.Ct. 501

In the Hvass case, the question was directly raised in a perjury case involving an attorney becoming entitled to practice in the United States courts. The question arose as to whether under Title 28, U.S. Codes, Section 1654, 2071 and Rule 83, Federal Rules of Civil Procedure authorizing federal courts to prescribe rules for the conduct of their business and their Local Rule 3, Hvass had committed perjury under Rule 3 under which the defendant took his oath and whether this was such a law as was intended by Congress to support an indictment for perjury. The District Court dismissed the indictment on this ground (147 F.Supp. 594)

The government brought that case to the Supreme Court of the United States on the question of jurisdiction to the hearing on the merits (353 US 980, 1 L.ed.2d 1140). The court held that the expression "a law of the United States" is not limited to statutes but includes as well rules and regulations which have been lawfully authorized and have a clear legislative basis. (355 US 570, 575, 576)

Likewise, we contend that the question here is a construction of application of Rule 7(c). As such it is a statute within the meaning of Section 3731 requiring a direct appeal to the Supreme Court of the United States.

III

THE DISMISSAL OF THE FIRST INDICTMENT,
WHICH WAS NOT APPEALED, IS RES JUDI-
CATA AS TO THE SECOND AND SUPERSEDING
INDICTMENT.

The first indictment, filed on July 29, 1964 (C.T. 2) and dismissed on November 2, 1964 (C.T. 53), covered similar allegations in three counts. No appeal was taken from the dismissal of the first indictment. This then became the law of the case and is res judicata.

U.S. v. Oppenheimer, 242 US 85, 87, 61 L.ed. 161

U.S. v. Di Angelo, 138 F.2d 466

Stroud v. U.S., 283 F.2d 137

Sealfon v. U.S., 332 US 575, 92 L.ed. 180

People v. Beltran, 94 Cal.App.2d 197, 202

74 Harvard L. Rev. 2931

1 Wharton 406

130 A.L.R. 374

140 A.L.R. 797

147 A.L.R. 991

65 Harvard L. Rev. 874

74 Harvard L. Rev. 1, 752

4 Stanford L. Rev. 536

In U.S. v. Oppenheimer, supra, the court says:

"It cannot be that the safeguards of
the person so often and so rightly

mentioned with solemn reverence are less than those that protect from a liability in debt."

In the Oppenheimer case, supra, a defendant and others were indicted for conspiracy to conceal assets from a trustee in bankruptcy. The indictment was dismissed on the ground that the statute of limitations had run on the offense. However, a controlling decision in another action held that the particular statute did not apply in such a case and a new indictment for the same offense was brought. The court held that the second indictment was properly quashed. Although the defendant had not been in jeopardy, the court held that the first judgment was a conclusive adjudication in favor of the defendant on his defense.

In Sealfon v. U.S., 332 US 575, 92 L.ed. 180, the defendant had been acquitted of conspiring to defraud the government by presenting false invoices. In a trial on the second indictment charging commission of the substantive offense of uttering and publishing the false invoices, he was convicted of aiding and abetting. Since conspiracy is a crime distinct from the substantive offense, there was no double jeopardy but the court held that the first judgment was a conclusive determination in favor of the defendant of the facts essential to the conviction of the offense charged in the second prosecution. The court held that this could not be done.

See also the following cases:

U.S. v. Salvatore, 140 F.2d 470

Wheatly v. U.S., 286 F.2d 519

U.S. v. Ragell Perez, 179 F.Supp. 619

IV

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE INDICTMENT IN THIS CASE, AS CONSTRUED AND APPLIED, VIOLATED THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND RULE 7(c), FEDERAL RULES OF CRIMINAL PROCEDURE, IN THAT AN INDICTMENT OF 148 PAGES, AND WEIGHING SEVERAL POUNDS, COULD NOT BE INTERPRETED AS BEING A PLAIN, CONCISE AND DEFINITE WRITTEN STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED.

The trial court, in dismissing this indictment, said:

"While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning matters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial

in Case No. 33,087-CR.

"Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indictment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated." (C.T. 287-288)

The indictment in this case violates the Sixth Amendment to the Constitution of the United States requiring that a defendant be informed of the nature and cause of the accusation. That amendment has been the law and still is the law.

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

We will deal with the application of Rule 7(c), Federal Rules of Criminal Procedure, as it construes and applies the Sixth Amendment to the Constitution in our next point.

V

RULE 7(c), FEDERAL RULES OF CRIMINAL PROCEDURE, WHICH REQUIRES AN INDICTMENT TO BE A "PLAIN, CONCISE AND DEFINITE WRITTEN STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED" IS VIOLATED BY A PROLIX INDICTMENT OF 148 PAGES, WEIGHING SEVERAL POUNDS, AND REQUIRES ITS DISMISSAL.

The indictment in this case violates Rule 7(c), Federal Rules of Criminal Procedure.

Rule 7(c), Federal Rules of Criminal Procedure, provides:

"Nature and contents. The indictment of the information shall be a plain, concise and definite written statement of the essential facts constituting the

offense charged ..."

Certainly it cannot be said that the indictment in this case is plain, concise and a definite written statement of the essential facts constituting the offense charged. By this language the rule meant to exclude non-essential facts under the rule of inclusio unius est exclusio alterius. The maxim means that it excludes from its effect all those matters not expressly mentioned; it means the inclusion of one thing is the exclusion of another.

Burgin v. Forbes, 169 S.W.2d 321, 325

Therefore, the rule intended to exclude all of the non-essential facts to the charge and in this case, the non-essential matters embracing the charge of perjury. The various counts, therefore, contain unessential matters, making for an indictment of 148 pages. Can such an indictment be said to be "concise"?

Concise statement of cause of action requires terseness of statement as distinguished from long and prolix history.

Dallas RR & Terminal Co. v. Sutherland, Texas,
27 S.W.2d 830, 832

In Taylor v. Neal, 157 N.E. 646, 260 Mass. 427, the complaint of 231 pages was held violative of that state's rule requiring a concise statement and demurrers thereto rightly sustained.

Under Rule 29 for Government of Courts of Civil Appeal

the Texas court held that the words "concise statement of the case", concise means "stated in a few words".

West Texas Utilities Co. v. Pennington, Texas,
11 S.W.2d 583, 584

The words mean the elimination of a long and prolix statement with a multitude of impertinent allegations.

McLaughlin v. Emery, 44 Mo. 350, 354

Chasson v. Marley, 28 S.E.2d 223, 224, 223 N.Car.
738

The word concise is defined as "brief, short; containing a few words or the principal matters only".

Curtiss v. Corbett, (N.Y.) 25 Howe's Pra. 58, 62,
63

The indictment in this case is therefore violative of Rule 7, Federal Rules of Criminal Procedure in that it is not (1) concise and (2) not confined to the essential facts constituting the offense.

Government counsel in his oral argument in the District Court acknowledged that parts of the indictment contained matters which are true and said he could pinpoint, if given time, the parts that he alleges are false. But he can do this only because of his familiarity with the case. It is not a plain, concise statement to one unfamiliar with the case.

In U.S. v. Cruikshank, 92 US 542, 575, 558, 23 L.ed.588 the Supreme Court of the United States said:

"In criminal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed of the nature and cause of the accusation'. Amendment VI. In U.S. v. Mills, 7 Pet. 142 this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged' and in U.S. v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged'. It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars.' (1 Arch. C.R. and P.L. 291). The object of the indictment is, first, to furnish the accused with such a description of the charge against him that it will enable him to

make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charges against him and the court must be able to decide whether the property taken was such as was the subject of larceny."

See also:

The Schooner Hoppet and Cargo v. U.S.,

7 Cranch 389, 3 L.ed. 380

Pettibone v. U.S., 148 US 197

U.S. v. Standard Brewery, 251 US 210

Wear v. U.S., 1 F.2d 617

U.S. v. Cook, 17 Wall. 168, 174, 21 L.ed. 738

Ledbetter v. U.S., 170 US 606, 611, 42 L.ed.

1162

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

U.S. v. Debrow, 203 F.2d 699, 702

An example of an indictment specifically setting out what the proposed perjury was to be is contained in U.S. v. Debrow, 203 F.2d 699, 702, footnote 1. There the grand jury charged as follows, giving exactly the testimony that allegedly was supposed to be false and that it was known to the defendant to be false:

"THE GRAND JURY CHARGES:

"1. That on or about the 9th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

HENRY DEBROW,

the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District

of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

"2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a study and investigation of whether applicants for appointment to offices and places under the government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with and

as a result of such activities, the identity of any such person engaged therein, and the extent to which such improper and corrupt activities affected the operation of departments and agencies of the United States.

"2. That at the time and place aforesaid the defendant

HENRY DEBROW

duly appearing as a witness before the Senate Subcommittee and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

"SENATOR HOEY: Go ahead and state just what that situation was.

"MR. DEBROW: *** On the way up Professor Hill said to me, 'Mr. Debrow, you knowing these fellows, I would like to make a thousand dollar contribution. Would you make it for me?' I said, 'Providing you are present, I will be glad to.'

"4. That the aforesaid testimony of the defendant, as he then and there well knew and believed was untrue in that on the

way up to the Century Building, at Jackson, Mississippi, to see the members of the Mississippi Democratic Committee, Professor Hill did not state to the defendant that he would like to make a thousand dollar contribution to the Committee and requested the defendant to make the contribution for him. (Sec. 1621, Title 18, U.S.C.)"

Compare this with the indictment in the present case which fails to set forth any facts and is based purely on conclusions of the pleader.

It will be noted in the indictment against the defendants that the indictment is not even in the language of the statute but is in general terms, so vague and uncertain that one must guess first at what the case was that was on trial. (Is the government afraid to mention Sinatra, Jr.?) Nor is the language of the statute followed in respect to the three transactions. Nevertheless, even if the language of the statute were followed, due process requires that the defendant be given notice of the nature and cause of the accusation. (Fifth Amendment and Sixth Amendment, United States Constitution.) This has always been the law, which is now reaffirmed and reiterated in Russell v. United States, 369 US 749, 765, 766, 8 L.ed.2d 240 (1962). Although this was not a conspiracy case it reaffirmed the law of conspiracy as we have set it out in United States v. Cruikshank,

supra, which was an early conspiracy case.

Although some cases seem to indicate in alleging conspiracy to commit a public offense it is not necessary to allege the offense alleged to have been conspired to be committed with the same degree of particularity required of an indictment alleging the commission of the offense itself, nevertheless Russell v. United States, 369 US 749, 765, 766, and Stirone v. United States, 361 US 212, 4 L.ed. 2d 225, dispell this view and reaffirm United States v. Cruikshank in 92 US 542, 23 L.ed. 588.

Russell v. United States, supra, says that

"These basic principles of fundamental fairness (referring to the minimum standard of apprising the defendant of the nature of the charges called upon to defend and descending to particulars) retain their full vitality under modern concepts of pleadings, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure."

The recent federal decisions which the Supreme Court cites are very much in point. First there is United States v. Simplot (DC Utah, 1961), 192 F.Supp. 734. This again was not a conspiracy case. But the indictment had charged perjury by saying that the defendant had committed perjury by testifying falsely on a material matter, namely, "an alleged conversation between himself and John Archer in Sun

Valley, Idaho, in the spring of 1954, concerning the termination of their business relationship". The indictment was dismissed because it did not allege what the false testimony was. So we learn from United States v. Simplot that perjury is among those crimes which cannot be pled in the generic language of the statute.

Two of the other recent federal decisions cited in the Russell case involved conspiracy indictments. One is United States v. Devine's Milk Laboratories (DC Mass., 1960) 179 F.Supp. 799. The indictment alleged the following conspiracy:

"... to commit certain offenses against the United States, that is to say, the offenses denounced by the provisions of Title 18 U.S.C. §§287 and 1001, to knowingly and willfully make and use, and cause to be made and used, false, fraudulent and fictitious statements in matters within the jurisdiction of the Department of the Army, an agency of the United States, and to knowingly and willfully make and present false, fictitious and fraudulent claims to the Department of the Army, an agency of the United States, all in violation of Title 18, U.S.C. §371."

The indictment was held insufficient. The court said that in the case of a conspiracy to commit an offense the

statement which is claimed to be false must be set forth, and if it is not the defect cannot be cured by reference to the overt acts. The latter point is not material to our problem because the overt acts in Count One of the indictment do not give any indication of what the alleged false testimony was even if they could be referred to. The first point, however, is directly analogous. Perjury and the making of false statements are similar things. Each involves the saying of something that is false. If particularity is required of one, there is no reason for not requiring it of the other. Further, we know from United States v. Simplot that an indictment charging perjury must allege what the false testimony was in order to satisfy the minimum standards of apprising the defendant of what he must defend against. There is no reason for distinguishing a conspiracy case in this regard. If fundamental fairness requires apprising the defendant of what the false testimony was when he is charged with perjury, it is just as necessary to apprise him of this when he is charged with conspiracy to do the same thing.

The other conspiracy case cited with approval in Russell v. United States is United States v. Apex Distributing Co. (DC R.I., 1957), 148 F.Supp. 365. The significance of this case is in illustrating various types of offenses which may not be pled in the generic language of the statute. The following portions of a conspiracy count

were held insufficient:

"B. To commit certain offenses against the United States, to wit:

"1. The crime of bribery in violation of Title 18, U.S.C., §201;

"2. The crime of knowingly making false statements and entries in violation of Title 18, U.S.C., §1001;

"3. The crime of knowingly and fraudulently obtaining from the United States moneys in excess of \$100.00 by means of false and fictitious invoices in violation of Title 18, U.S.C., §1003;

"4. The crime of knowingly making false, fictitious and fraudulent claims against the United States in violation of Title 18, U.S.C., §287;

"5. The crime of knowingly and with intent to defraud and mislead, introducing and delivering for introduction into interstate commerce certain misbranded food in violation of Title 21, U.S.C., §331 et seq."

In the light of these principles, let us now examine Count One of the indictment in detail. It charges a conspiracy to commit three offenses, namely:

1. Perjury.

2. Influencing witnesses.
3. Obstruction of justice.

PERJURY

As to perjury, the indictment says that the defendants conspired as follows:

Page 1, lines 30-32: "2. To commit perjury in the United States District Court for the Southern District of California in Case 33087-CD in violation of 18 U.S.C. §1621; and"

Page 2, lines 15-19: "It was further part of said conspiracy that unindicted co-conspirators Irwin and Amsler would commit perjury and testify falsely and contrary to the oath of a witness in Case 33087-CD in the United States District Court for the Southern District of California."

This portion of the charge is patently deficient for at least two reasons:

One. It does not state or indicate in any way what the alleged false testimony was. It does not even indicate what the subject matter of the testimony was. And it does not even indicate the nature of the case in which the perjury was to be committed. This is an essential element of an indictment charging conspiracy to commit perjury.

Two. If we assume that conspiracy to commit perjury could be pled in the generic language of the statute, which it cannot, the indictment is still deficient. One element of the crime is that the false statement be as to a material

matter. 18 USCA 1621. Materiality is not even pled here by way of conclusion.

INFLUENCING WITNESSES

As to influencing witnesses, the indictment says that the defendants conspired as follows:

Page 1, lines 26-29: "1. To corruptly endeavor to influence, intimidate, and impede witnesses in the discharge of their duties as witnesses in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 USCA §1503;"

Page 2, lines 11-14: "It was part of said conspiracy that witnesses would be instructed to testify falsely and contrary to the oath of a witness, in Case 33087-CD in the United States District Court for the Southern District of California."

This portion of the charge is subject to the same criticism. The first part appearing at page 1, lines 26-29, is nothing more than a paraphrasing of the first clause of 18 USCA 1503, which reads: "Whoever corruptly ... endeavors to influence, intimidate or impede any witness, in any court of the United States. ..."

This is a statement of the offense in the most general terms possible. The pleading leaves it to speculation as to why the endeavor was corrupt, and whether the means of the endeavor was to influence, intimidate or impede. The most serious deficiency is in failing to state the object of

the endeavor, i.e., whether it was to induce the witnesses not to testify, to testify falsely, or in some other manner to fail to discharge their duties as a witness. There is an attempt to avoid the latter deficiency only in the portion of the indictment at page 2, lines 11-14. Here it is said that, "witnesses would be instructed to testify falsely and contrary to the oath of a witness, in Case 33087-CD". So the indictment says that the object of the endeavor was to induce the witnesses to commit perjury. Thus we are led into the same situation - perjury. If that is the claim, and it is the only one that appears from the indictment, then it is essential to show what the false testimony was and how and in what manner it was material.

OBSTRUCTION OF JUSTICE

As to obstructing justice, the indictment says that the defendants conspired as follows:

Page 2, lines 1-5: "3. To corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Southern District of California in case 33087-CD, in violation of 18 USCA §1503."

Page 2, lines 20-29: "It was further part of said conspiracy to endeavor to influence, obstruct and impede the due administration of justice and prospective jurors, jurors, prospective witnesses, and witnesses prior to and during the trial in Case 33087-CD in the United States

District Court for the Southern District of California, by conveying and publishing both in the courtroom and outside of the courtroom, the false information that there was bona fide evidence that no crimes were committed because the alleged criminal acts were arranged as a publicity stunt and hoax by and on behalf of the alleged victim well knowing that there was no such evidence."

The first portion at page 2, lines 1-5, is a paraphrasing of the generic language of the last clause of 18 USCA 1503: "Whoever ... corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice. ..."

The explanation of what it is that it is claimed to be an endeavor to obstruct justice is in the second portion at page 2, lines 20-29. That explanation is, and the charge therefore is, that the defendants conspired to endeavor to obstruct justice by making the claim that there was bona fide evidence that the Frank Sinatra, Jr. kidnapping was a hoax, knowing that there was no such evidence. There are two good reasons why this does not state a public offense.

One: Stated in the worst abstract way possible, the charge is that the defendants conspired to tell lies. It is not charged that they conspired to tell lies under oath. Lying is a reprehensible thing, but the only kind of lying that is criminal is lying under oath. That is not the

charge made here, and no public offense is stated.

Two: It is not necessary to interpret the indictment in that way. The charge is that the defendants falsely claimed that there was bona fide evidence. Why the word bona fide? When you consider a few other undisputed facts, this will become significant. First, Root and Forde are lawyers. They represented Irwin and Amsler, two of the defendants in Case No. 33087-CD, which was the Frank Sinatra, Jr., kidnapping case. Second, Root and Forde raised the defense that their clients were not guilty because of consent of the alleged victim. The theory of their defense was that the kidnapping had been arranged by or on behalf of Frank Sinatra, Jr., as a publicity stunt. In raising this defense Root and Forde stated in their opening statements that they expected to prove this defense. In their closing arguments they stated that they believed that they had proved this offense.

Now, let us assume first that there was no evidence whatsoever for the claimed defense. Is that a crime? Does a lawyer obstruct justice when he claims in his opening statement that he will prove a fact and then fails to prove it? Does he obstruct justice when he argues at the end of his case that he has proved a fact and nobody believes him? If these things be considered an obstruction of justice, then our adversary system is in itself an obstruction of justice.

But the assumption of no evidence is not our situation anyway. We now come to the significance of the word bona fide. The indictment does not say that there was no evidence. It says that there was no bona fide evidence. So the indictment admits that there was evidence, but says that the defendants obstructed justice because their evidence was not bona fide. This is not an oversight on the part of the pleader. Consider this evidence, a good deal of which was corroborated by the alleged victim. In the getaway car were Amsler, Keenan and Frank Sinatra, Jr. At one point of getaway the car was stopped. It was snowing. Amsler ran and hid some distance from the car because a police car was approaching and did in fact stop to investigate. Keenan was out of the car working on the tire chains. Frank Sinatra, Jr., was in the back seat of the car. He did nothing when the police investigated. Up to that point Amsler and Keenan had guns. They then threw them away. In order to avoid detection (of three men in a car), Amsler concealed himself in the trunk, Keenan drove, and Frank Sinatra, Jr., rode in the back seat. They were thus able to clear several roadblocks. At no time did Sinatra, Jr., do or say anything to indicate that he was being kidnapped. Reasonable men can differ as to what inferences to draw from this evidence. But surely it cannot be said that a lawyer is guilty of crime in arguing from it his or her inferences as to what it shows regarding the kidnapping and

whether it was consented to and whether it was a genuine kidnapping.

There was other evidence, albiet disputed and much of it hearsay, which bears more directly on the defense claimed. The point, however, is illustrated by the above described evidence which is uncontradicted. The point is that this indictment charges two lawyers with conspiring to obstruct justice by raising what the Government claims to be a spurious defense in behalf of their clients in a criminal case. No case that we have read has ever held or even suggested that this is a crime. It is easy to conceive why the prosecutor would be in favor of such a rule. It would give him a great measure of control over the manner in which his prosecutions were defended. To put it bluntly, his job would be much easier than it is now, and justice, as he sees it, would be duly administered with much greater dispatch. Even the most fearless lawyer would be hesitant to incur the wrath of the prosecutor. All criminal cases would necessarily be defended at the risk of indictment for obstructing justice if they are lost. If we call it an obstruction of justice to claim an affirmative defense without evidence to support it, there is no reason to stop there. Would it not be just as much an obstruction to the due administration of justice to plead not guilty and stand trial when the evidence of guilt is conclusive?

Counsel suggested that the defense could strike matters

as surplusage. That is not the job of the defense, but the task of the prosecutor in returning the indictment.

Furthermore, an indictment cannot be amended but must be re-submitted to the grand jury.

In Russell v. U.S., 369 US 749, 8 L.ed.2d 240, the Supreme Court said:

"A grand jury, in order to make the ultimate determination (whether a person should be held to answer in a criminal trial...) must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of the grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. See Orfield, Criminal Procedure From Arrest to Appeal, 243.

"This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by re-submission to the grand jury,

unless the change is merely a matter of form. *Ex parte Bain*, 121 US 1, 30 L.ed. 849, 7 S.Ct. 781; *United States v. Norris*, 281 US 619, 74 L.ed. 1076, 50 S.Ct. 424; *Stirone v. United States*, 361 US 212, 4 L.ed.2d 252, 80 S.Ct. 270. 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. ... Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as

presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.' *Ex parte Bain*, *supra* (121 US at 10, 13). We reaffirmed this rule only recently, pointing out that 'The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.' *Stirone v. United States*, *supra* (361 US 218).

"For these reasons we conclude that an indictment under 2 USC §192 must state the question under congressional committee inquiry as found by the grand jury. Only then can the federal courts responsibly carry out the duty which Congress imposed upon them more than a century ago:

"'The question must be pertinent to the subject-matter, and that will have to be decided by the courts of justice on the indictment.'

"Reversed."

Thus the statement of counsel to strike is an admission that the indictment is defective and any alteration of the indictment in its context is not a change in merely a matter of form but of substance and would change the indictment from what the grand jury had returned to something that the prosecutor and the court subsequently guessed was in the minds of the grand jury.

We respectfully submit, then, that this indictment is defective because it violates Rule 7, Rules of Criminal Procedure, and is not a plain, concise and definite written statement of the essential facts constituting the offense charged.

In a perjury case which also includes subornation of perjury, the indictment which contains material and immaterial matters must be specific as to the material matters alleged to be perjurious or the indictment is defective and fails to apprise the defendant of the specific offense which he is charged with and required to meet.

U.S. v. Cobert, 227 F.Supp. 915

See also:

48 C.J. 879, §128

U.S. v. Seymour, 50 F.2d 930

In U.S. v. Laut, 17 F.R.D. 31, at 34, the indictment failed to inform the defendant of definite portions of his testimony material to the inquiry, though it detailed specific questions and answers. The court held that materiality

or pertinency as considered in relation to perjury is not a mere personal privilege but is an essential element of the crime of perjury. Apparently in that case, as in the case at bar, there were included a series of most irrelevant statements so far as the charges were concerned. The court held that the allegations must show that the false statements are material to the matters at bar.

The court there said:

"Not only does Count Two swallow up the most irrelevant of defendant's 1950 statements, but, equally important, it does not require that such untruths were knowingly or wilfully uttered in 1950. As a result, the slightest mistake in 1950, knowingly repeated in 1951, would warrant conviction. To sustain that count would thus be to make lying itself, apart from the import or relevance of the matter queried, material to the 1951 hearing.

"Such a result would in effect read materiality out of the statute and flaunt apparent Congressional purpose. In naturalization proceedings, like most hearings, questions posed range from the trifling to the crucial. Queries may be, as one Court of Appeals recently observed, merely

'preliminary in nature', not 'themselves pertinent', but asked on the mere 'possibility that they might [lead] to later relevant questions.' *Bowers v. United States*, 1953, 92 US App. D.C. 79, 202 F.2d 447, 452. Even relevant questions, moreover, may lack that 'substantial degree' of importance needed to make them material. *United States v. Lattimore*, D.C. Cir. 1954, 215 F.2d 847, dissent by Edgerton, J.; see also *La Salle v. United States*, 10 Cir. 1946, 155 F.2d 452, 454; *Pyle v. United States*, 1946, 81 U.S. App.D.C. 209, 156 F.2d 852, 856; *Central & Southwest Utilities Co. v. Securities and Exchange Commission*, 1943, 78 U.S. App. D.C. 37, 136 F.2d 273, 275; *Robinson v. United States*, 1940, 72 App. D.C. 254, 114 F.2d 475, 476. Enacting Section 1015(a) Congress aimed, not at such trivia, but rather at false testimony likely to mislead immigration or naturalization officials in the conduct of their appointed tasks. So it is that, construing this statute as well as its earliest forerunners, courts have without exception held that, though materiality is not specified, the false state-

ments alleged must be material to the matter at bar. *Bridges v. United States*, 9 Cir. 1952, 199 F.2d 811, 829, reversed on other grounds 1953, 346 US 209, 73 S.Ct. 1055, 97 L.ed. 1557; *United States v. Bressi*, D.C. Wash. 1913, 208 F. 369, 371; see also *United States v. Sebastianelli*, D.C.M.D. Pa. 1933, 3 F.Supp. 698.

"To accord with Congressional design, Section 1915(a) should be read in the same light as analogous provisions which specify that false statements charged must be material. And, it seems to me clear, as one Court of Appeals recently held, that materiality or 'pertinency' is not a mere 'personal privilege *** waived if not seasonably asserted' by refusal 'to answer a question which is not pertinent', but instead an essential 'element of the criminal offense which must be shown by the prosecution.' *Bowers v. United States*, 1953, 92 U.S. App. D.C. 79, 202 F.2d 447, 452; see also *United States v. Lattimore*, D.C. Cir. 1954, 215 F.2d 847. Where materiality is not shown, the indictment thus must fail. See *Bowers v. United States*, 1953, 92 U.S. App. D.C. 79, 202 F.2d 447, 452; *United*

States v. Garvett, D.C.E.D. Mich. 1940, 35 F.Supp. 644; United States v. Seymour, D.C.D. Neb. 1931, 50 F.2d 930; United States v. Cameron, D.C.D. Ariz. 1922, 282 F. 684; United States v. Rhodes, D.C. S.D. Ala. 1913, 212 F. 518; United States v. Pettus, C.C.W.D. Tenn. 1897, 84 F. 791; United States v. Perdue, D.C.W.D. Pa. 1880, 4 F. 897.

"Beyond doubt, Count Two charges no probably material false statement. Alleged only is that defendant in 1951 knowingly lied about the truth of any of his 1950 statements. Since many of defendant's 1950 answers were not then material, lying about the truth of any one of them one year later, during rehearing of the same issue, must likewise be immaterial. Apart from this defect under Section 1015(a), this pervasive charge, in addition, falls since it 'fail[s] to inform the defendant of the definite portions of his testimony which were material to the inquiry.' United States v. Seymour, D.C. Neb. 1931, 50 F.2d 930; see also F.R. Crim. Proc. 7(c), 18 U.S.C."

The court further said:

"*** [T]he facts set forth as falsely
*** sworn to should be sufficient in them-

selves to show such materiality.'" Markham v. United States, 1895, 160 US 319, 325, 16 S.Ct. 288, 291, 40 L.ed. 441. Such facts may 'not be left to surmise or to be reached by way of inference or argument.' Danaher v. United States, 8 Cir., 1930, 39 F.2d 325, 327; see United States v. Seymour, D.C.D. Neb. 1931, 50 F.2d 930."

Summing up, we submit that the rule regarding perjury indictments is that where the indictment contains both material and non-material matters that the materiality must be specifically shown and set out.

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

We respectfully submit that the construction and interpretation of Rule 7(c), Federal Rules of Criminal Procedure, require this Court to uphold the dismissal of the indictment.

VI

AN INDICTMENT CHARGING SUBORNATION OF PERJURY IS FATALY DEFECTIVE IN FAILING SPECIFICALLY TO POINT OUT IN PLAIN, SIMPLE LANGUAGE JUST WHAT WAS FALSE, WHAT WAS KNOWN TO THE WITNESS WHO TESTIFIED TO BE FALSE AND WHETHER THE DEFENDANT KNEW THAT IT WAS FALSE AT THE TIME OF THE ALLEGED

SUBORNATION AND AT THE TIME OF THE
TESTIMONY.

U.S. v. Dennee, Fed.Cas. No. 14,947, involved an

action in the Court of Claims by one Harriet Mills against the United States to recover proceeds of 100 bales of cotton which she said were taken by the military forces in August of 1876 and afterwards sold and the proceeds, amounting to \$40,000, was paid into the Treasury of the United States. The indictment alleged that the defendant, a lawyer, R. Stewart Dennee and Samuel Gamage, a yeoman, "unlawfully, corruptly, wickedly and maliciously did solicit, suborn and instigate and endeavor to persuade and did then and there suborn, instigate and procure one Martha L. Knight to appear before Robert H. Shannon, a United States Court Commissioner authorized to administer oaths, and did then and there wickedly and corruptly instigate and procure the said Martha L. Knight to give evidence and her deposition in said issue ... and upon her corporal oath, duly administered according to law, to falsely swear and give evidence to certain matters material and relevant to the said issue, and to matters therein and thereby put in issue and to the effect following, that is to say..." The court then sets out a requirement of subornation of perjury in its opinion:

"The crime of subornation of perjury has several indispensable ingredients which must be charged in the indictment or it will be fatally

defective: (1) The testimony of the witness suborned must be false. (2) It must be given willfully and corruptly by the witness, knowing it to be false. (3) The suborner must know or believe that the testimony of the witness given, or about to be given will be false. (4) He must know or believe that the witness will willfully and corruptly testify to facts which he knows to be false. A careful scrutiny of the counts of this indictment fails to reveal any averment that the defendants knew or believed that the testimony of the witness whom they are charged with suborning would be false, or that they knew it was false, or that they knew that the witness knew it was false, or that they knew that she would willfully and corruptly testify, or had willfully and corruptly testified to facts as true, knowing them to be false.

"To make a good indictment for subornation of perjury the false swearing must be set out with the same detail as an indictment for perjury, and the indictment must charge that the defendants procured the witness to testify knowing that the testimony would be false, and knowing that the witness knew that the testimony he had given, or was about to give, was false, and knowing that he

would corruptly and willfully give false testimony. In the case of Com. v. Douglass, 5 Metc. [Mass.] 244, the defendant was indicted for subornation of perjury. On the trial the court below instructed the jury that 'if it was proved to them beyond a reasonable doubt that the defendant on the former trial for forgery (referred to in the indictment) put Fanny Crossman on the stand or caused her to be put on the stand as a witness, knowing that she would testify as set forth in the indictment, and intending that she should so testify, and he put her on the stand, or caused her to be put on the stand for the purpose of her so testifying, and she did so testify and such testimony was false, and he knew when he put her on the stand, that if she did so testify her testimony would be false; it would be sufficient to prove that part of the indictment which alleged that defendant suborned Fanny Crossman to commit perjury as set forth in the indictment.'

"This charge was assigned for error, and the supreme judicial court in passing upon it said: 'The remaining exception to the charge of the presiding judge is of more importance, and is, we think, well founded. The jury were instructed that if certain facts stated in the exceptions were

proved beyond reasonable doubt, it would be sufficient proof of that part of the indictment which charged that the defendant suborned Fanny Crossman to commit perjury. Now, we are of opinion that all these facts might exist and yet the defendant might not be guilty of the crime charged in the indictment. The defendant might know or believe -- for he could not know with certainty -- that the witness whom he called would testify as she did, and he might know that her testimony would be false, but if he did not know that she would willfully testify to a fact knowing it to be false, he could not be convicted of the crime charged. If he did not know or believe that the witness intended to commit the crime of perjury, he could not be guilty of the crime of suborning her. To constitute perjury the witness must willfully testify falsely, knowing the testimony given to be false. 1 Hawk. P.C. c. 69, §2; Bac. Abr. "Perjury," A; 2 Russ. Crimes, 1753. A witness, by mistake or defect of memory, may testify untruly without being guilty of perjury or any other crime.' Subornation of perjury is in its essence but a particular form of perjury itself. 2 Bish.Cr. Law, §1197. See, also, What. Prec. Ind. pp. 598, 599, forms c.d. See, also, form of indictment in

Archb. Cr. Pl. & Ev. pp. 575, 577. See same form, 2 Bish. Cr. Proc. §878; State v. Carland, 3 Dev. 114.

"Tested by these authorities, both counts of the indictment are bad, first, because they do not aver that the defendants knew that the testimony which they instigated the witness to give was false, and second, because there is no averment that the defendants knew that the witness knew that the testimony she was instigated to give was false.

"Demurrer sustained."

We submit that each of the counts herein contain the same fatal defect as was contained in U.S. v. Dennee, supra.

We adopt the further argument made by counsel for appellee Forde on this point as well as on other points in order to prevent repetition.

VII

AN INDICTMENT FOR SUBORNATION OF PERJURY IS FATALLY DEFECTIVE IN FAILING TO ALLEGE THAT THE DEFENDANT KNEW THAT THE TESTIMONY WHICH HE INFLUENCED THE SUBORNED WITNESS TO GIVE WAS FALSE AND THAT IN GIVING SUCH TESTIMONY THE WITNESS WOULD WILFULLY AND CORRUPTLY COMMIT THE CRIME OF PERJURY.

The argument under this point is contained in the argument under Point VI and is incorporated hereunder by reference.

VIII

AN INDICTMENT CHARGING SUBORNATION OF PERJURY AND SETTING OUT THAT THE MATTERS WERE MATERIAL MUST SPECIFY MORE THAN THE CONCLUSION THAT IT IS MATERIAL AND SPECIFY WHEREIN THE TESTIMONY WAS AND IS MATERIAL SO THAT THE COURT, IN THE FIRST INSTANCE, CAN DETERMINE WHETHER A CRIME HAS BEEN CHARGED AND WHETHER THE DEFENDANT CAN HAVE THE PROTECTION ON APPEAL AND OTHER PROCEEDINGS OF SHOWING THE LACK OF MATERIALITY OF THE MATTERS ALLEGED TO HAVE BEEN SUBORNED TESTIMONY.

The rule requiring that an indictment set forth the essential facts, to-wit: Rule 7(c), Federal Rules of Criminal Procedure, as well as the Sixth Amendment, does not eliminate the requirement that an indictment must set forth the essential facts showing materiality which is an essential ingredient in the crime of perjury and subornation of perjury.

U.S. v. Laut, 17 F.R.D. 31, at 34

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

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The effect of failing to allege materiality would swallow up Rule 7(c) and also the Sixth Amendment.

We have set forth the argument on materiality in more detail under Point V .

See also:

Bowers v. U.S., 92 U.S. App. D.C. 79, 202 F.2d

449, 452

U.S. v. Garvett, 35 F.Supp. 644

U.S. v. Seymour, 50 F.2d 930, 940

U.S. v. Cameron, 282 F. 684

U.S. v. Rhodes, 212 F. 518

Danaher v. U.S., 39 F.2d 325, 327

IX

THE APPELLEE ROOT CAN RAISE THE POINT
AS TO THE SYSTEMATIC EXCLUSION OF LAWYERS
FROM THE GRAND JURY WHICH RETURNED THE
INDICTMENT AS A VIOLATION OF HER CONSTI-
TUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH
AMENDMENTS TO THE CONSTITUTION OF THE
UNITED STATES.

The trial court rejected additional grounds raised by appellee Root that systematic exclusion of lawyers (C.T. 215) was not a ground on which he acted and he specifically denied these grounds. (C.T. 288)

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This does not preclude consideration of those grounds on this appeal.

U.S. v. Meyer, 266 F.2d 747, 756

Jaffke v. Dunham, 352 US 280, 281, 1 L.ed.2d

314

U.S. v. Curtiss-Wright Export Corporation,

299 US 304, 329, 330, 81 L.ed. 255

U.S. v. Kahriger, 345 US 22, 33 (footnote

14), 97 L.ed. 754

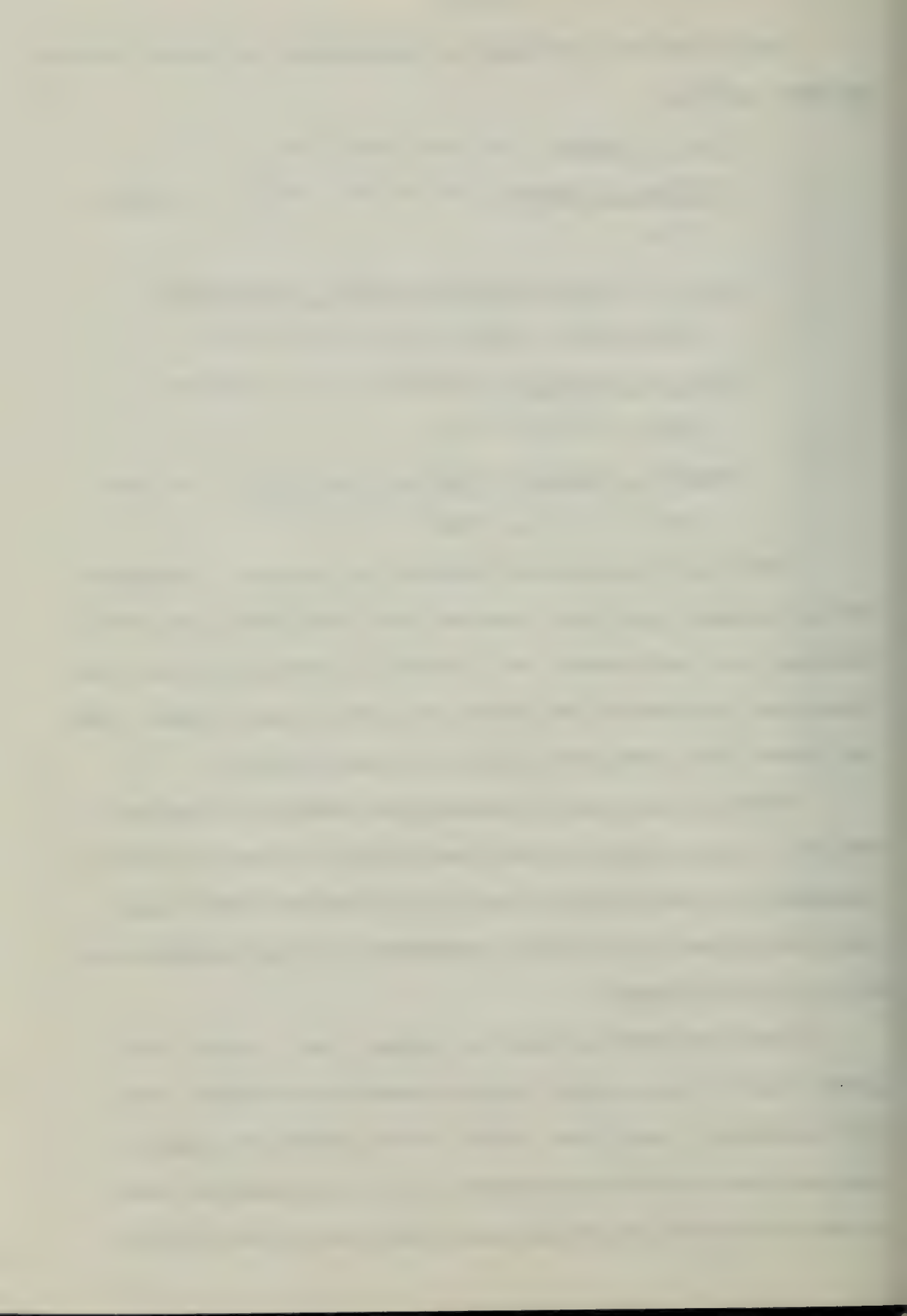
Posey v. Tennessee Valley Authority (5th Cir.

1937), 93 F.2d 726

The court incorrectly denied the motion to dismiss the indictment upon the grounds that the grand jury which returned the indictment was illegally constituted in that there was systematic exclusion of lawyers as a class from the grand jury, and particularly women lawyers.

Such an exclusion violates due process of law and the equal protection of the laws guaranteed by the Fifth Amendment to the Constitution of the United States and the provisions of the Sixth Amendment to the Constitution of the United States.

There is nothing about a lawyer, as a class, that gives rise to any reason why he should be excluded from jury service. Until the order of the District Court in Los Angeles eliminating lawyers as a class, lawyers were permitted to sit on juries and grand juries and they are



known to be permitted to sit in other Districts and other areas.

That they may be challenged, or that their type of work may be such as to make them either more desirable or less desirable as jurors does not require their disqualification.

The systematic exclusion of any class of jurors from the federal grand jury or District Court jury is a violation of due process of law guaranteed by the Fifth Amendment and the Sixth Amendment to the Constitution of the United States.

Brown v. Allen, 344 US 443, 97 L.ed. 469

Avery v. Georgia, 345 US 559, 97 L.ed. 1244

Hernandez v. Texas, 347 US 475, 98 L.ed. 866

Williams v. Georgia, 349 US 375, 99 L.ed.

1161

Reece v. Georgia, 350 US 85, 100 L.ed. 77

Eubanks v. Louisiana, 356 US 584, 2 L.ed.2d 991

Re Jugiro, 140 US 291, 30 L.ed. 510

In Eubanks v. Louisiana, 356 US 584, 2 L.ed.2d 991, the court said:

"In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws as guaranteed by the Fourteenth Amendment

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if he is indicted by a grand jury
or tried by a petit jury from which
members of his race have been excluded
because of their race."

We think the same rule applies to exclusion of
attorneys, because they are attorneys, from service on a
grand jury, and a grand jury which excludes attorneys
systematically and by rule, violates equal protection
of the laws as guaranteed by the due process clause of
the Fifth Amendment to the Constitution of the United
States.

The Supreme Court said:

"Nor is this court at liberty to
grant or withhold the benefit of equal
protection, which the Constitution
commands for all, merely as we may deem
the defendant innocent or guilty. *Hill*
v. Texas, 316 US 400, 406, 86 L.ed.
1559, 1563."

The exclusion of women lawyers, as a class,
from the grand jury equally makes the indictment defective.

Ballard v. U.S., 329 US 187, 91 L.ed. 181

Thiel v. So. Pacific Co., 328 US 217, 90 L.

ed. 1181, 166 ALR 1412

In *Ballard v. U.S.*, supra, the Supreme Court of the
United States said:

The first part of the paper discusses the importance of the study of the history of the English language. It is pointed out that the study of the history of the English language is not only a matter of historical interest, but also a matter of practical importance. The study of the history of the English language is necessary for a full understanding of the English language in its present state. It is also necessary for a full understanding of the English language in its future state. The study of the history of the English language is necessary for a full understanding of the English language in its present state. It is also necessary for a full understanding of the English language in its future state.

The second part of the paper discusses the importance of the study of the history of the English language. It is pointed out that the study of the history of the English language is not only a matter of historical interest, but also a matter of practical importance. The study of the history of the English language is necessary for a full understanding of the English language in its present state. It is also necessary for a full understanding of the English language in its future state. The study of the history of the English language is necessary for a full understanding of the English language in its present state. It is also necessary for a full understanding of the English language in its future state.

"We are met at the outset with a concession that women were not included in the panel of grand and petit jurors in the Southern District of California where the indictment was returned and the trial had; that they were intentionally and systematically excluded from the panel."

Similarly, in the instant case, we are met at the outset with the concession that lawyers as a class were not included in the grand jury and petit jury in the Southern District of California wherein this indictment was returned, "that they were intentionally and systematically excluded from the panel by an order of court."

In Ballard v. U.S., supra, the Supreme Court, quoting from Thiel v. So. Pacific Co., supra, said:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn with a cross section of the community ... Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group



or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. 328 US 217, 90 L.ed. 1181" (329 US 192, 193, 91 L.ed. 185)

X

THE APPELLEE ROOT CAN RAISE THE POINT AND HAVE THE COURT DETERMINE THE INVALIDITY OF THE INDICTMENT ON THE GROUND THAT WOMEN LAWYERS WERE EXCLUDED FROM THE GRAND JURY WHICH RETURNED THE INDICTMENT.

The same argument we have presented for excluding lawyers, as a class, applies equally to excluding women lawyers, as a class.

See:

Ballard v. U.S., 329 US 187, 91 L.ed. 181

XI

THE COURT SHOULD STRIKE THE GOVERNMENT'S BRIEF ON APPEAL FOR NON-COMPLIANCE WITH THE RULES OF THIS COURT FOR FAILURE TO

the first of these is the fact that the
 system is not a simple one, and that
 the results are not always the same.
 The second is that the system is not
 a simple one, and that the results are
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 a simple one, and that the results are
 not always the same.

SET OUT THE PROLIX AND LENGTHY
INDICTMENT OF 148 PAGES IN ITS OPEN-
ING BRIEF.

Rule 18, Rules of the United States Court of Appeals
for the Ninth Circuit, requires that briefs contain:

"...A statement of the pleadings
and the facts disclosing the basis
upon which it is contended that the
District Court had jurisdiction and
that this Court has jurisdiction to
review the judgment, decree or order...."

The appellant's brief fails to set out Section 3731
of Title 18, U.S. Codes and also fails to set out the
Local Rule adopted by the judges in the United States
District Court for the Southern District of California, Cen-
tral Division, excluding lawyers from the grand and petit
juries.

We think this, alone, makes the appellant's brief
fatally defective and it should either be stricken or refer-
red back for correction.

Appellant's brief also fails to set out the pleadings
which are under attack, which are 148 pages long, on long
paper, and would run more likely to 200 or more pages on
the size paper required by this Court, and would therefore
be a violation of this Court's rule regarding a brief of
80 pages in length.

Appellant's brief is also inadequate in presenting the issues to this Court so this Court could, itself, see on its face that the document is not a plain, concise and definite written statement of the essential facts constituting the offenses charged and therefore it is a circuitous route of avoiding what we think the rule requires, namely, to set up for this Court the whole of the indictment so that it can see for itself that it violates the Sixth Amendment to the Constitution of the United States and Rule 7(c), Federal Rules of Criminal Procedure, and is demonstrative evidence of that fact.

We think, in the absence of setting up the indictment totidem verbis, that the brief does not comply with Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit and that the appeal either should be dismissed or the brief sent back to the United States Attorney for further correction and amplification and obtaining of the consent of Court to have a brief of proper length.



Counsel for appellee Root hereby and herewith adopts by reference all the arguments and points made by counsel for appellee George Forde as though fully set forth herein and for the sake of avoiding repetition.

CONCLUSION

WHEREFORE, appellee Root prays that this Honorable Court affirm the order of the District Court dismissing the indictment; or, if the Court does not affirm said order, then

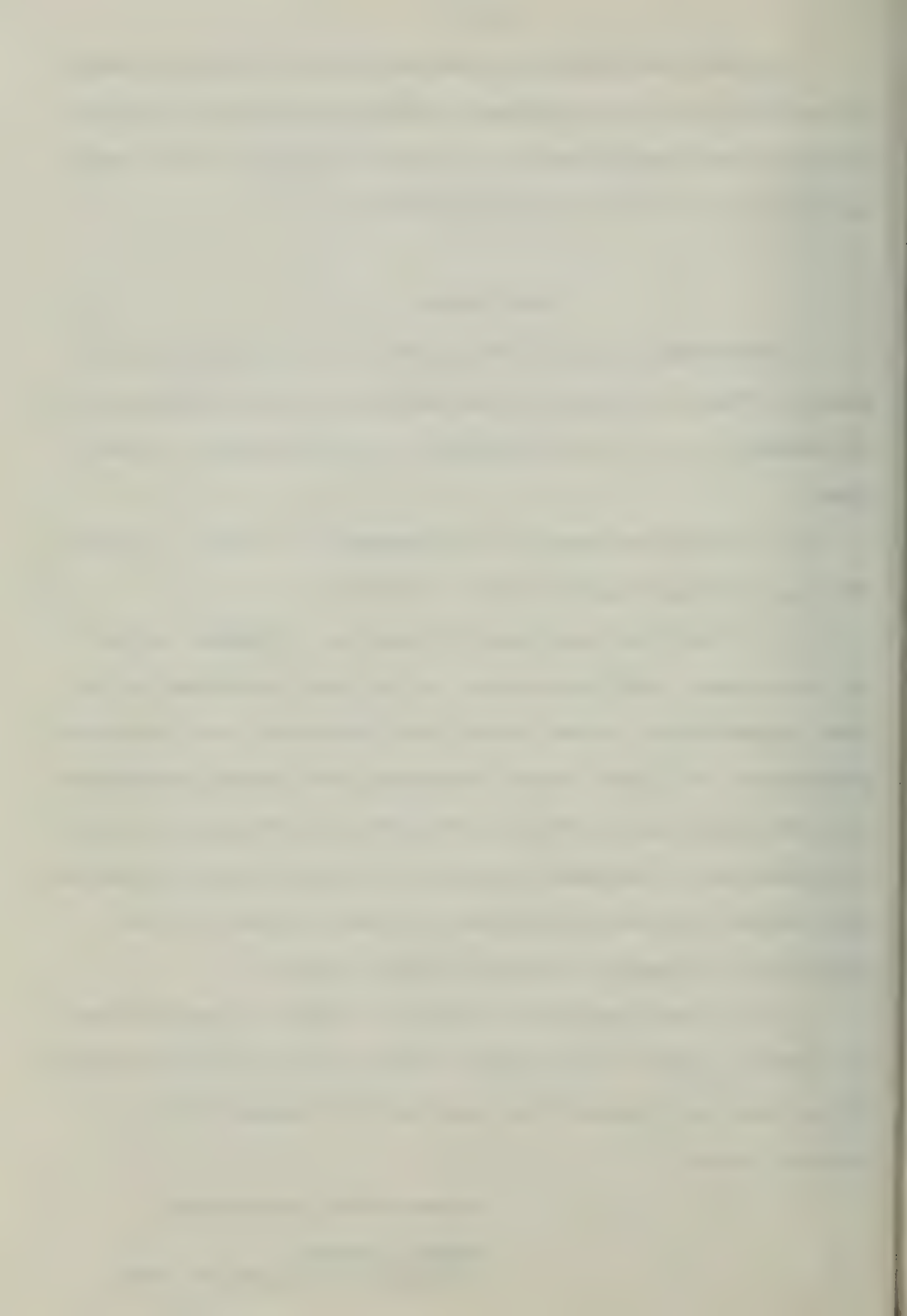
1. That the appeal be dismissed for want of jurisdiction of this Court to hear the same.

2. That the appellant's brief be stricken as not in compliance with the rules, or to give appellant a further opportunity to set forth the indictment and to obtain permission to file a brief exceeding the length permitted by the rules and to fully set forth the statutes on which jurisdiction is claimed and also the Local Rules regarding the composition and selection of grand juries and the exclusion of lawyers from the grand juries.

3. After compliance with the rules, if permission is granted, and if this Court holds that it lacks jurisdiction, then to transfer the case to the United States Supreme Court.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellee Root



CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Morris Lavine
Attorney for Appellee Gladys
Towles Root

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CONSTITUTIONAL PROVISIONS,
STATUTES AND RULES INVOLVED

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation; ..."

Title 18, Section 1503, U.S. Codes:

"Influencing or injuring officer, juror or witness generally.

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States, or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other

committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

Title 18, Section 1621, U.S. Codes:

"Perjury generally.

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or

certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

Title 18, Section 1622, U.S. Codes:

"Subornation of perjury.

"Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

Title 18, Section 3731, U.S. Codes:

"Appeal by United States.

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment

is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Rule 7(c), Federal Rules of Criminal Procedure:

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. ..."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA,)	
)	NO. 34,352-CR.
Plaintiff,)	
)	
v. .)	<u>MEMORANDUM</u>
)	
GLADYS TOWLES ROOT, et al.,)	
)	
Defendants.)	

The defendants are lawyers who represented Barry W. Keenan, Joseph Clyde Amsler and John William Irwin who were convicted of kidnapping one Frank Sinatra, Jr., in Case No. 33,087-Criminal, in this District and Division.

The trial in that case began February 10, 1964, and concluded on March 7, 1964. It is charged in the Indictment that the defendants herein represented the convicted kidnapers from on or about December 14, 1963 to the conclusion of that trial.

This is the second indictment against the defendants for alleged crimes arising out of, or in connection with, their representation of the defendants in that trial. The first was dismissed by the Court for failure to state an offense.

The present indictment is in five counts covering 148 pages.

The First Count is for conspiracy (1) to defraud the



United States; (2) to corruptly obstruct, et cetera, witnesses, in violation of 18 U.S.C. 1503; (3) to suborn perjury in violation of 18 U.S.C. 1622; (4) to commit perjury in violation of 18 U.S.C. 1621; and (5) to corruptly obstruct, et cetera, justice in violation of 18 U.S.C. 1503, all in said Case No. 33,087-CR. The Second Count is for alleged subornation of perjury of Defendant Joseph Clyde Amsler in said Case No. 33,087-CR., and is in XII paragraphs containing 509 questions and answers, and covers 69 pages; the Third Count is for alleged subornation of perjury of John William Irwin, covering 67 pages in XXI paragraphs with 236 questions and answers; and the Fourth and Fifth Counts charge obstruction of justice by having Joseph Clyde Amsler (Fourth Count) and John William Irwin (Fifth Count) testify falsely in the kidnapping trial, Case No. 33,087-CR.

While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning matters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR.

Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indict-



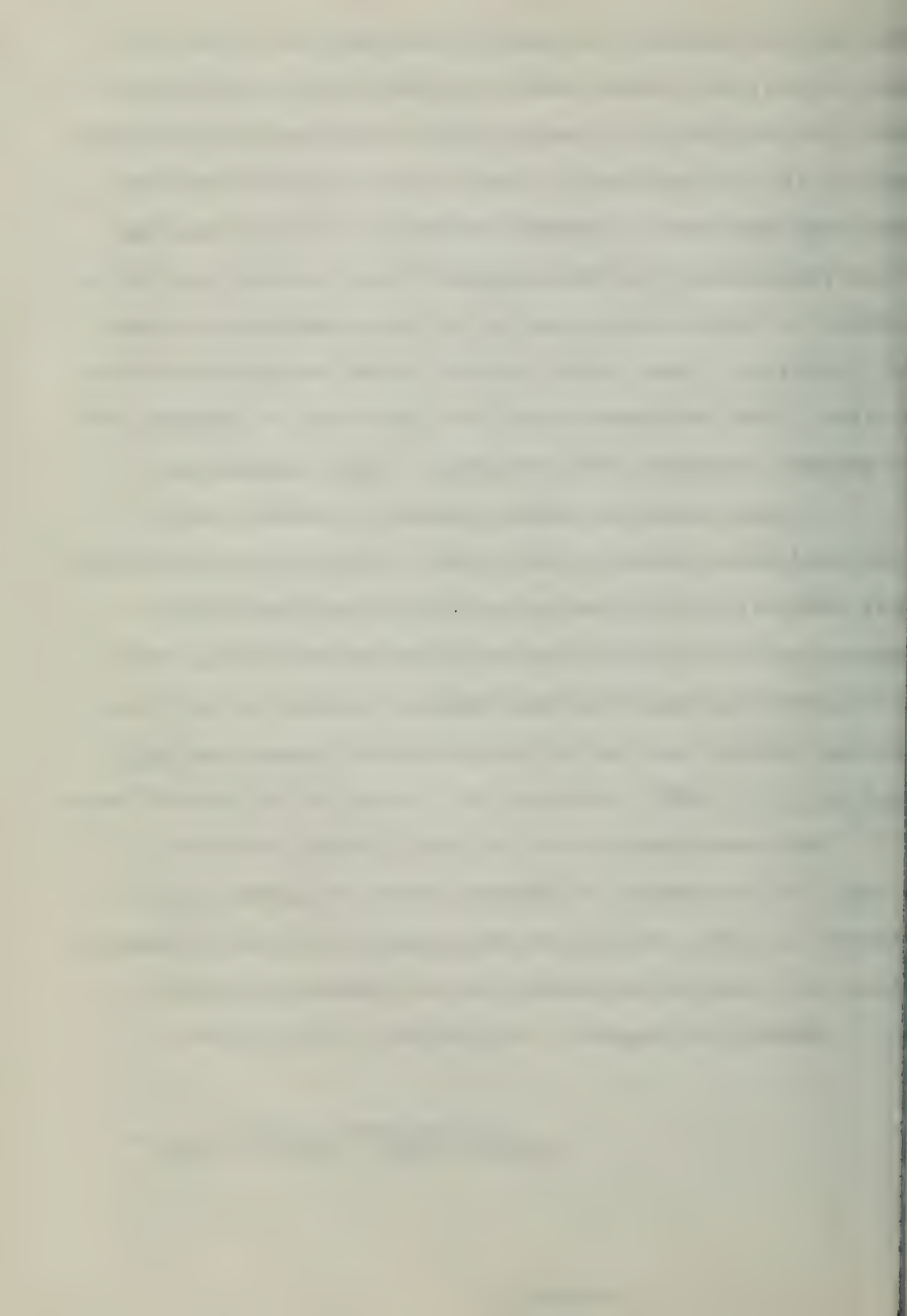
ment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated.

It would serve no useful purpose to indulge in a prolonged dissertation of my views. It is sufficient to say that the Motions are granted on the grounds and for the reasons set forth in the Motion of Defendant Forde, and on the authorities cited by both defense counsel in their supporting briefs, and, as to the conspiracy count, on Pettibone v. U.S., (1893) 148 U.S. 197, cited by the United States.

The Court specifically rejects grounds numbered 2, 3, 4 and 5 in the Motion of defendant Root to quash, filed on January 12, 1965, and in the Supplemental Motion to Dismiss filed on behalf of defendant Root on January 18, 1965.

Dated: Los Angeles, California, June 28, 1965.

/s/ Peirson M. Hall
United States District Judge



NO. 20360

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GLADYS TOWLES ROOT and
GEORGE A. FORDE,

Appellees.

FEB 10 1967

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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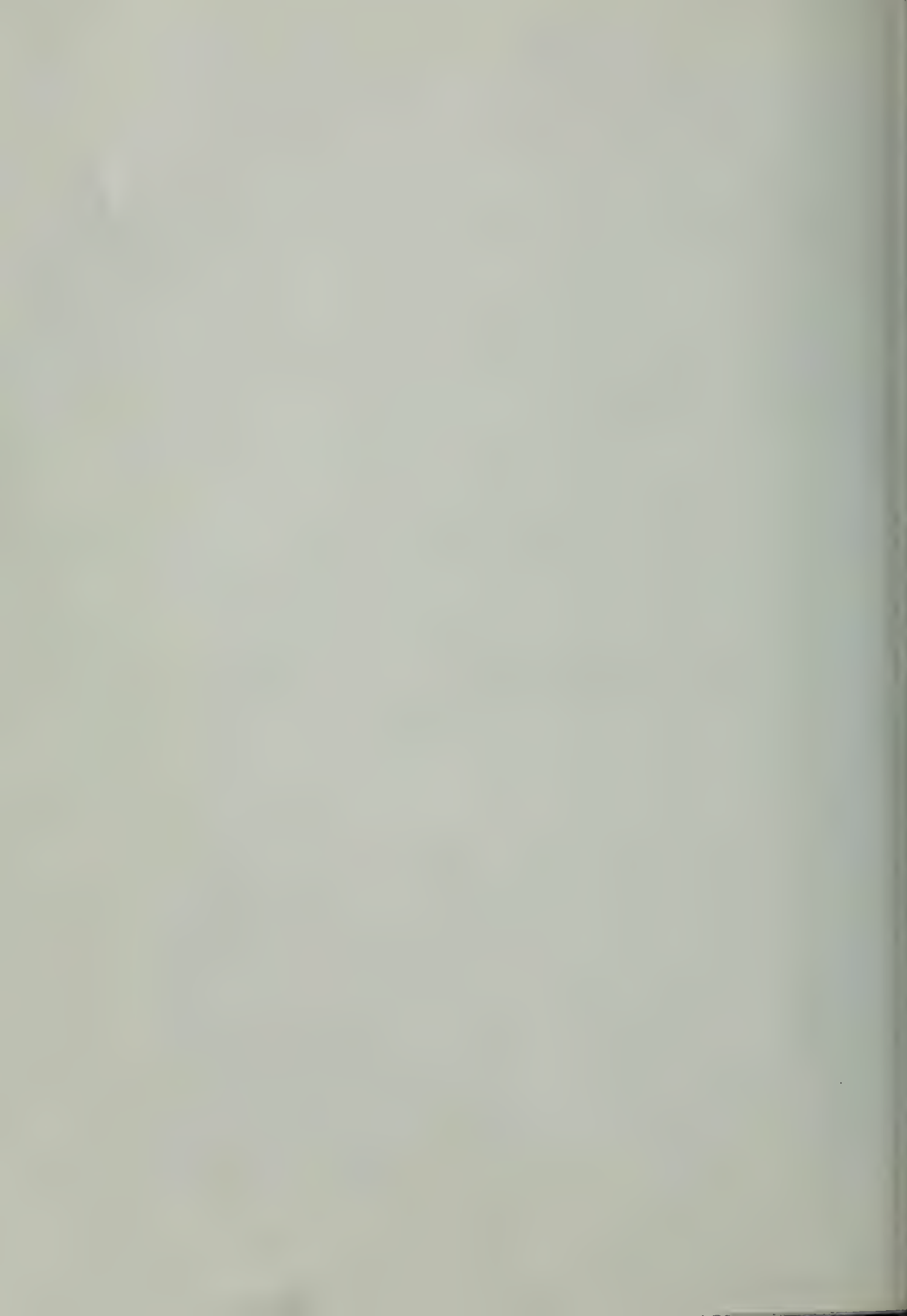
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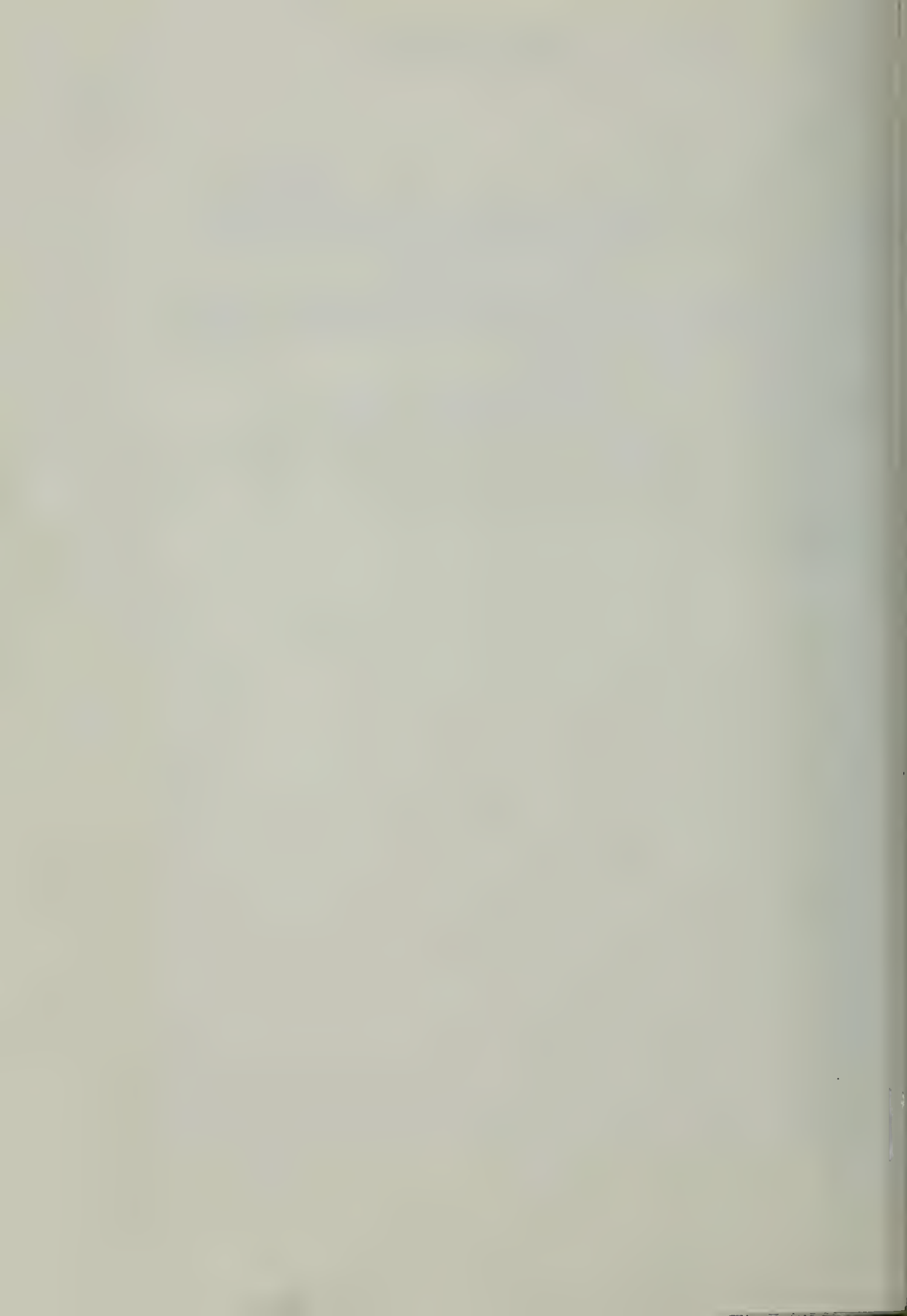
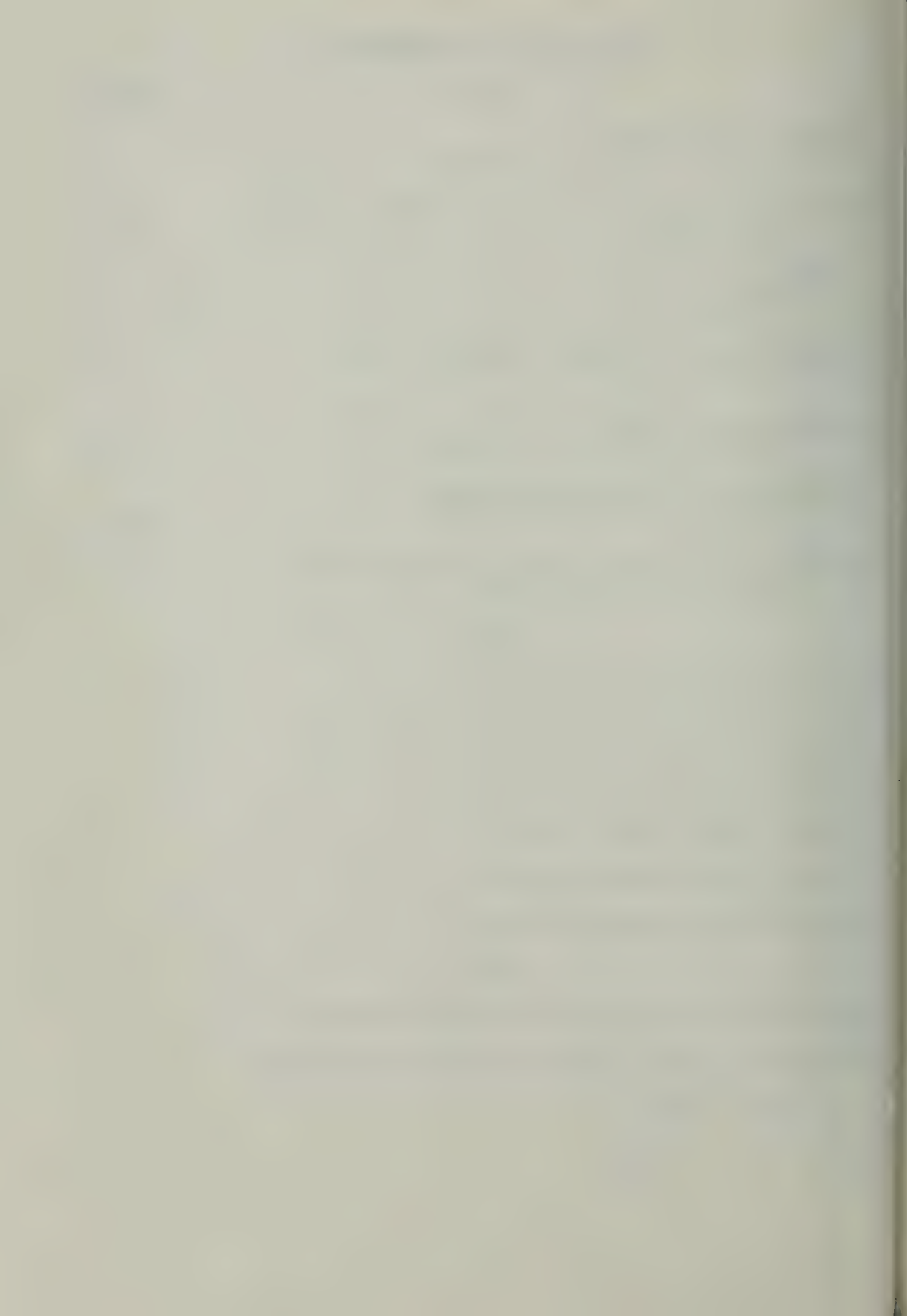


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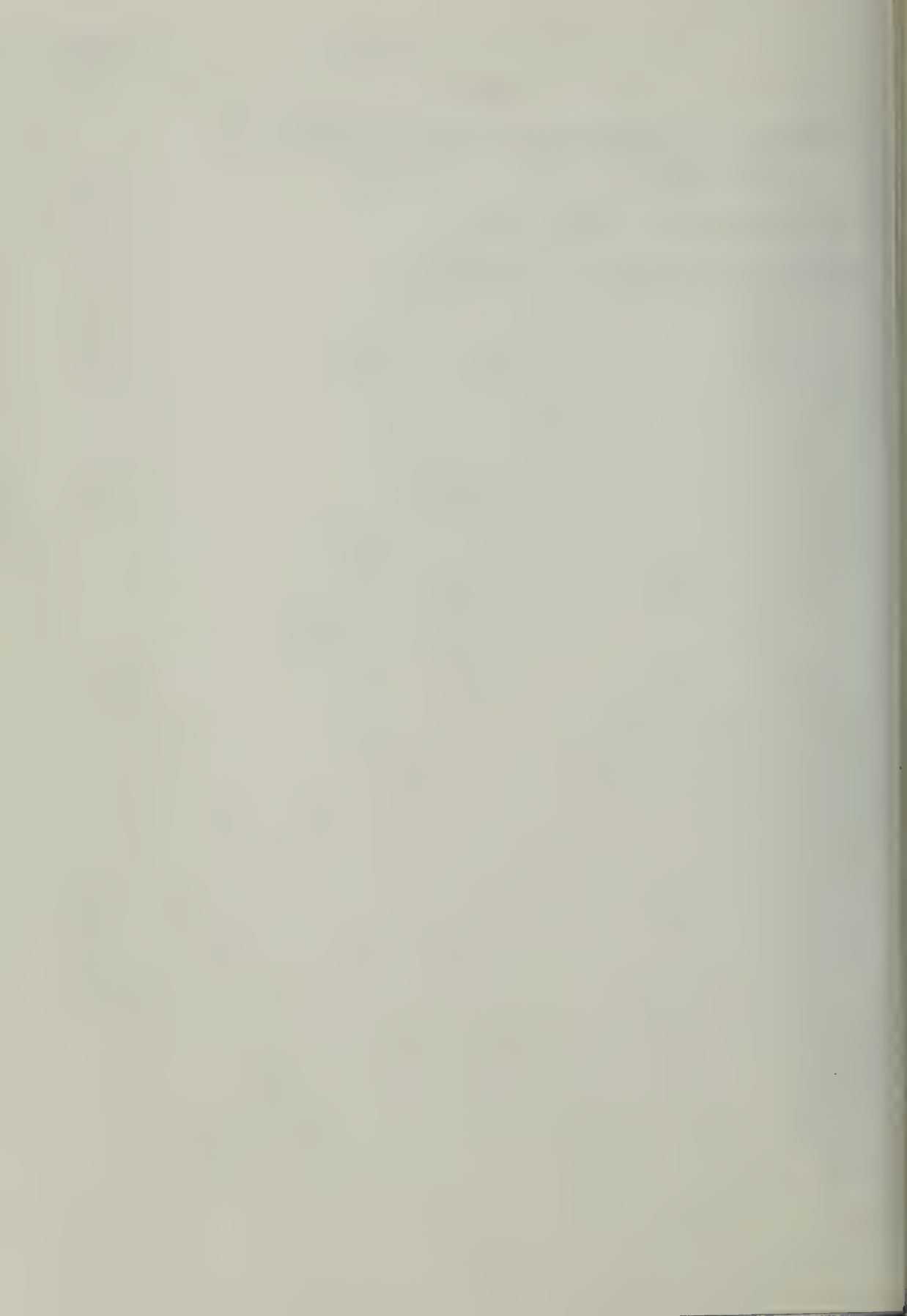
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GLADYS TOWLES ROOT and
GEORGE A. FORDE,

Appellees.

APPELLANT'S REPLY BRIEF

Except for several contentions, which appellees did not present in the court below and to which this reply brief is addressed, appellees' briefs essentially restate points briefed in their motions to dismiss [C. T. 202-231, 244-248, 251-268, 277-285] and have been dealt with in appellant's opening brief.

I

THE DISMISSAL OF THE FIRST INDICTMENT
WHICH WAS DISMISSED ON THE GROUND OF
INSUFFICIENCY IS NOT RES JUDICATA AS TO
THE SECOND INDICTMENT.

Appellees raise this additional matter, which was not urged in the court below. They now contend that the dismissal of Counts One, Four and Five of the second indictment was required under

the rule of res judicata in that the dismissal of the first indictment was based on the failure of the Government to plead the alleged false testimony and that, as to the conspiracy and obstruction of justice counts in the second indictment (Counts One, Four and Five) the Government is estopped to contend otherwise [appellee Forde's br. pp. 24-26; appellee Root's br. pp. 12-14].

(a) In the first place, Counts One, Four and Five of the instant indictment, as appellee Forde concedes, do differ from the conspiracy and obstruction of justice counts in the first indictment [appellee Forde's br. pp. 3, 24]. As to six subject matters, the particular areas of false testimony are specifically set forth [appellant's op. br. pp. 10, 17-19, compare C. T. 2-4 and C. T. 55-59; compare C. T. 6 and C. T. 199].

(b) Assuming arguendo that Counts One, Four and Five of the second indictment are no different for purposes of the usual application of collateral estoppel in civil and criminal proceedings, the dismissal of a bad indictment is no bar to prosecution upon a good one and appellee Forde concedes he is not so contending [appellee Forde's br. p. 25]. Yet, if the rule of res judicata is applied to the dismissal of an insufficiently pled indictment, how could the Government successfully reindict on such counts? None of the cases relied upon by the appellees supports their contention. As appellees point out, Oppenheimer involved the dismissal of an indictment for conspiracy to conceal assets in bankruptcy on the ground that the offense charged was barred by the statute of limitations [appellee Forde's br. p. 25;

appellee Root's br. p. 130]. Mr. Justice Holmes stated:

"Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law . . . a plea of the statute of limitations is a plea to the merits and however the issue was raised in the former case, after judgment upon it, it could not be re-opened in a later prosecution. . . . "

(emphasis supplied).

United States v. Oppenheimer (1916),

242 U.S. 85, 87, 61 L.Ed. 161, 164.

Similarly, a reading of the other cases cited by appellees will disclose that they all involved matters competently adjudicated on the merits in the prior proceedings. De Angelo involved a robbery indictment which alleged De Angelo's presence at and participation in the robbery. The Government had offered proof in support of these allegations at the first trial. The jury had returned a verdict of acquittal as to De Angelo. At the later trial of the conspiracy indictment the court held the Government was estopped from relitigating those facts. Appellee Forde's br. p. 25, United States v. De Angelo (3rd Cir. 1943), 138 F.2d 466.

In Stroud [appellee Forde's br. p. 25], where the matter of double jeopardy was squarely presented by the defendant and decided adversely to him by the United States Supreme Court and he later moved to vacate the sentence under 28 U.S.C. 2255,

raising the same ground of double jeopardy, the court applied the rule of res judicata. Stroud v. United States (10th Cir. 1960), 283 F.2d 137.

Sealfon relied on by appellee Root is also inapposite in that it involved an acquittal of conspiracy to defraud the United States in connection with the sugar rationing program which was held to bar a subsequent prosecution for the substantive offense. Sealfon v. United States, 332 U.S. 575, 92 L.Ed. 180.

Judge Mathes stated the law clearly as to when a court may invoke collateral estoppel in United States v. Rangel Perez (D. C. S. D. Calif. 1959), 179 F.Supp. 619, 622. Appellee Forde's br. p. 26.

"To be conclusive in a subsequent criminal proceeding by virtue of the doctrine of collateral estoppel the facts determined by the earlier judgment must, of course, have been fully tried and necessarily adjudicated in order to reach judgment on the issues involved in the essential elements of the crime charged."

(Citing Sealfon v. United States, supra, and other cases; Anderson, "Res Judicata With Respect to Criminal Judgments," 120 N. Y. L. J. 2194 (1939), 65 H. L. R. 818, 874-880).

There was, of course, no such adjudication on the merits here and res judicata cannot be invoked.

II

APPELLEE ROOT'S CONTENTION THAT THIS COURT LACKS JURISDICTION OF THIS APPEAL IS WITHOUT MERIT 1/

Appellee Root asserts that this Court lacks jurisdiction to entertain this appeal because the indictment under submission requires a construction and interpretation of Rule 7(c) Federal Rules of Criminal Procedure [appellee Root's br. pp. 2, 9]. This argument as to the exclusive jurisdiction of the Supreme Court of the United States is based on the following provision of Title 18, Section 3731, United States Code:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. "

The judgment of dismissal in the District Court in the case at bar was not based upon the invalidity or construction . . . of the statutes upon which the indictment . . . was "founded", i. e. ,

1/ We note that appellee Forde concurs in the Government's statement of the Pleadings and Facts disclosing jurisdiction [appellee Forde's br. p. 1].

18 United States Code §371, §1503, §1622 [appellant's op. br. 1-2].

Hvass, the only case cited in support of appellee Root's argument is inapposite [appellee Root's br. p. 11]. In Hvass, the dismissal was based upon the District Court's holding that the local rule under which the attorney defendant took his oath was not a "law of the United States" for purposes of Title 18, U. S. C. §1621. There the dismissal directly involved and was based upon the trial court's construction of the perjury statute underlying the indictment. That, of course, is not the case here. Judge Hall's dismissal did not rest on a determination as to the reach of any of the statutes upon which the indictment was founded but rather with a deficiency in pleading [C. T. 286-288]. United States v. Borden Co., 308 U.S. 188 [appellant's op. br. p. 9]. See generally, Annotation 2 L. ed.2d 1805, 1806 and cases cited therein.

III

APPELLEE ROOT'S POINTS IX AND X
RELATING TO THE BIAS AND PREJUDICE
OF THE GRAND JURY ARE AN ATTEMPT
TO REINSTATE A CROSS-APPEAL WHICH
THIS COURT HAS DISMISSED.

The trial court based its dismissal on insufficiency of pleading and specifically rejected certain additional grounds asserted by appellee Root in support of her motion [C. T. 215, 288]. Appellees filed Notice of Cross-Appeal on the grounds rejected by the trial court [C. T. 295]. The appellant moved to dismiss the cross-appeal on the ground that appellees were not "aggrieved"

by that portion of the judgment which they sought to have reviewed and for lack of "finality" as to that portion of the judgment [see appellant's Notice of Motion to Dismiss Cross-Appeal and Points and Authorities which appellant incorporates herein by reference]. This Court, on January 3, 1966, dismissed the cross-appeal and denied appellees' petition for leave to file for Writ of Prohibition and Mandate. Notwithstanding these rulings of this Court, appellee Root now seeks in effect to relitigate these issues [appellee Root's br. pp. 52-54]. ^{2/} Appellant submits this matter has been fully briefed, argued and decided by this Court and requires no further reply. In the event, upon oral argument of this matter, the court indicates a disposition to consider these grounds on this appeal, appellant would request leave to file a supplemental reply brief addressed to Points IX and X raised by appellee Root.

Appellee Root asserts that the Court should strike appellant's opening brief "for failure to set out the prolix and lengthy indictment of 148 pages" [appellee Root's br. pp. 57-58]. This, of course, is absurd in that Rule 18(2)(b) refers simply to a "statement of the pleadings and facts" not the pleading itself totidem verbis. Even assuming any reasonable ground for such an assertion, appellee Root has not brought it to the attention of this court in the manner prescribed by the very rule under which she claims appellant's brief is "fatally defective" [appellee Root's

^{2/} While not adopting or arguing these grounds asserted by appellee Root, appellee Forde by footnote joins appellee Root in urging that this Court is not precluded from consideration of these grounds [appellee Forde's br. p. 5, fn. 2].

br. pp. 58-59], Rule 18(2)(b)(7) Rules of the United States Court
of Appeals for the Ninth Circuit.

Respectfully submitted,

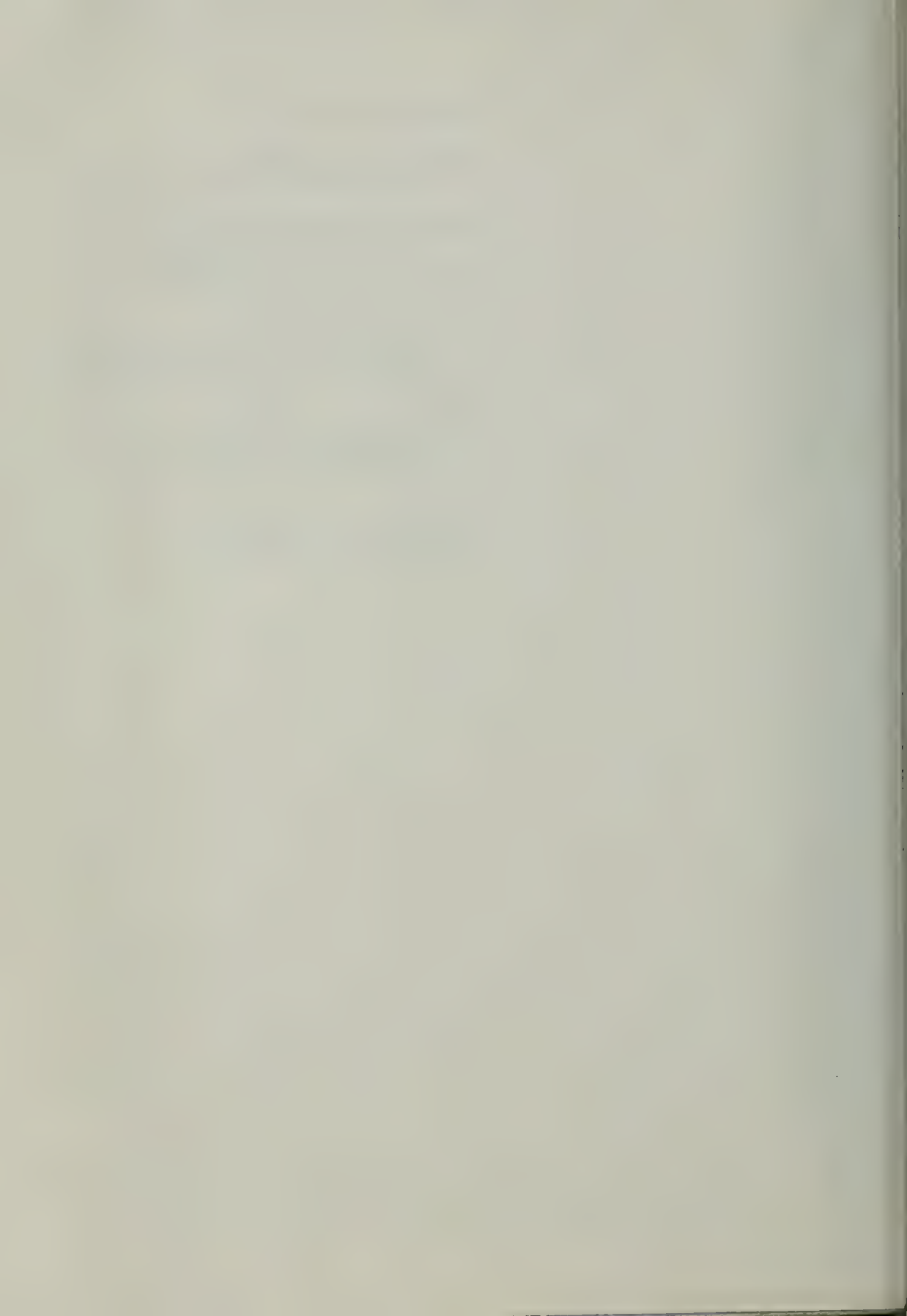
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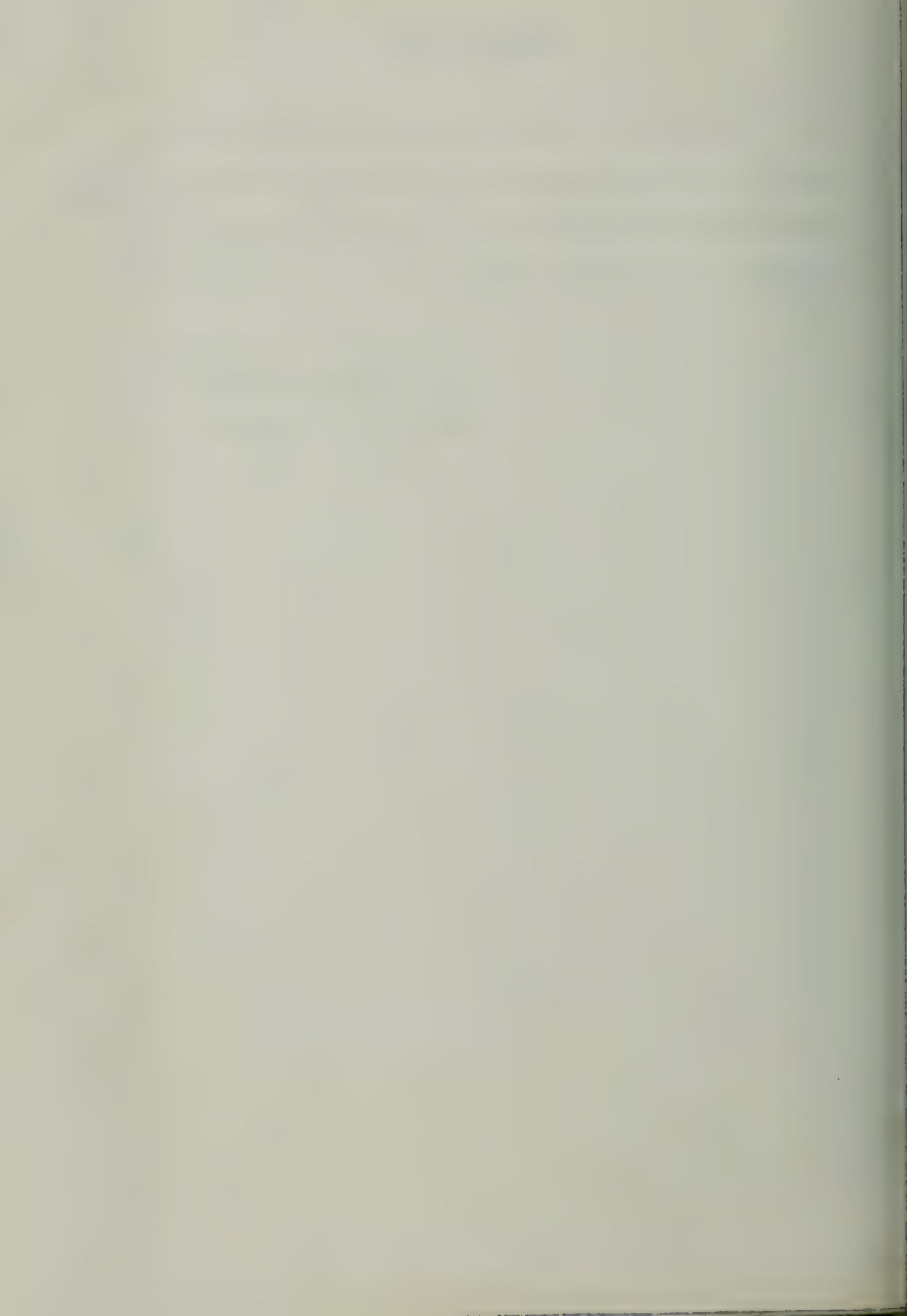


CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Donald A. Fareed

DONALD A. FAREED



No. 20368 /

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SHAPIRO, BERNSTEIN & Co., INC.,

Appellant,

vs.

4636 S. VERMONT AVE. INC., a California
corporation, doing business as
REED'S MUSIC STORE,

Appellee.

APPELLANT'S OPENING BRIEF

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FILED

JAN 31 1966

WM. B. LUCK, CLERK

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IN THE
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SHAPIRO, BERNSTEIN & Co., INC.,

Appellant,

vs.

4636 S. VERMONT AVE. INC., a California
corporation, doing business as
REED'S MUSIC STORE,

Appellee.

APPELLANT'S OPENING BRIEF

PRELIMINARY STATEMENT

This case presents the strikingly unusual situation where a party was found guilty of copyright infringement but the copyright owner was awarded no relief against it, as a result of which the *infringer* was awarded its attorneys fees. The action was brought in the District Court under Section 101 of the Copyright Act, 17 U.S.C. § 101. Plaintiff sought an injunction against further infringement, damages in an amount not less than the minimum of \$250 per infringement specified in Section 101, and the surrender of any infringing works still in the possession or control of the defendant. The infringe-

ments were of the copyrights of twelve musical compositions (popular songs) owned by the appellant (plaintiff in the District Court and so designated throughout this brief). Infringement was caused by the distribution and sale by appellee (defendant in the District Court and so designated throughout this brief) of a loose-leaf book containing the titles, words and music of approximately 1,000 popular songs, including the twelve owned by plaintiff. The book had been published and sold to the defendant by a "music pirate" without plaintiff's knowledge or permission. Infringement was established at the trial, and the District Court so found. Nevertheless, as noted, plaintiff was denied relief and defendant was awarded its attorneys fees.

RECORD CITATIONS AND ABBREVIATIONS

Plaintiff has appealed from the judgment, bringing up a transcript of record consisting of two volumes, the first of which ("1 Tr.") consists of designated portions of the Clerk's Transcript and the second of which ("2 Tr.") consists of the Reporter's Transcript of the trial.

Reference to specific findings made by the court below will be abbreviated to "F." followed by the appropriate number of the finding or findings ("FF.") and the appropriate record citation.

JURISDICTION

The jurisdiction of the District Court arose under the Copyright Act, the Act of March 4, 1909, 35 Stat. 1081; 17 U.S.C. § 1, et seq (1 Tr. 2, 115). Jurisdiction of this Court to review the judgment exists under 28 U.S.C. § 1291 and 17 U.S.C. § 114.

STATEMENT OF THE CASE

1. Facts

Prior to and in June 1962 plaintiff was the owner of the copyrights of the popular songs known as —

“LIGHTS OUT”

“THE ONE ROSE”

“PENNSYLVANIA POLKA”

“MEMORIES OF YOU”

“TOO FAT POLKA

(SHE’S TOO FAT FOR ME)”

“SOMEBODY ELSE IS TAKING MY PLACE”

“BY THE BEAUTIFUL SEA”

“SIDE BY SIDE”

“SWEET SUE — JUST YOU”

“ROSE OF WASHINGTON SQUARE”

“EXACTLY LIKE YOU”

“HAVE YOU EVER BEEN LONELY

(HAVE YOU EVER BEEN BLUE)”

(1 Tr. 119-120; Pltf. Exs. 3 and 15). Plaintiff’s only business was and is the printing, publishing and selling of copyrighted musical compositions, including those twelve songs (1 Tr. 116, 226).

Defendant operates a retail music store under the trade name “REED’S MUSIC STORE” in Los Angeles, California, primarily selling pianos and organs but also selling printed musical compositions (1 Tr. 227; 2 Tr. 58-59). Defendant’s President purchased four copies of a loose-leaf compilation of popular songs from one “Mel Alan” (2 Tr. 60-79, 92), a person who came in off the street

and was unknown to defendant's President or anyone else in the defendant company (2 Tr. 54-56). The first book was purchased in August 1961, the second in December of that year, and two more in May 1962 (2 Tr. 60-79; Pltf. Exs. 8, 11 & 14). One or more copies of the book were prominently displayed in a glass case in defendant's store and offered to customers for cash sale (2 Tr. 79-80, 115-116). Defendant sold at least three such books to its customers prior to the commencement of this action (2 Tr. 81).

The books purchased by defendant from "Mel Alan" was entitled "OVER 1,000 FAVORITE STANDARD SONGS, VOLUME 1," and each copy contained reproductions of the title, lyrics and music of each of plaintiff's twelve songs* (1 Tr. 116-117, 227). The books were shabby in appearance and format, having spiral bindings and paper covers. The pages were cheaply reproduced from typewritten and hand-lettered material, rather than regularly typeset (2 Tr. 97-104). A copy of the book was in evidence as plaintiff's Exhibit 1. The book is of a type useful for persons playing songs on a piano or other instrument, in that it gives him the basic melody and the lyrics and he can then "fake" the harmony. During the trial, this type of book was commonly referred to by the trade term, "fake book" (1 Tr. 54, 110-111).

The "Mel Alan" from whom defendant purchased the book had no consent or authority of the plaintiff to print, reprint, copy, vend, arrange or adapt the music and lyrics of any of plaintiff's songs in issue here (1 Tr. 120). In fact, "Mel Alan" was an alias name, and that person

* Defendant purchased other books from "Mel Alan" at the same time, but these apparently did not contain copies of plaintiff's songs and were not in issue at the trial (Pltf. Ex. 8, 11 & 14; 2 Tr. 92-93).

under his true name was convicted of criminal violation of the Copyright Act by reason of the sale of such books (2 Tr. 22-23; Pltf. Ex. 4). "Mel Alan" was in effect a music pirate. The infringing book bought by defendant and similar ones were problems to plaintiff throughout the country (2 Tr. 16). Plaintiff made efforts, through advertisements in music publications and direct mail pieces, to warn persons in the music business against distributing or offering for sale such infringing books (2 Tr. 19-21, 24, 39-45, 47-48).

Plaintiff did not know at the time that defendant had purchased the four copies of the infringing book. The acts of defendant in selling copies of the book were committed without the previous solicitation, procurement, knowledge, consent or authority of the plaintiff (1 Tr. 120; 2 Tr. 8-11).

The infringing sales by defendant were discovered by reason of the visit of Mr. T. Tempesta to defendant's store in June 1962. One of defendant's salesmen sold to Mr. Tempesta a copy of the infringing book (1 Tr. 116-117). At that time Mr. Tempesta was regularly employed as an investigator by the Music Publishers Protective Association, Inc., a nonprofit organization whose membership consists of numerous music publishers, including plaintiff (1 Tr. 118). His duties included discovering sellers of infringing and illegal books such as the ones sold by defendant. Mr. Tempesta entered defendant's store in the course of his duties for the purpose of discovering whether it was selling or offering for sale books containing unauthorized copies of musical compositions owned by members of the Association (1 Tr. 118-119, 229). There was no evidence that Mr. Tempesta knew before he purchased the book that any of the twelve songs belonging to plaintiff were included therein, and it

was stipulated at the trial that the sale was without the previous knowledge of the plaintiff (2 Tr. 8-11).

Plaintiff was actually damaged by the sales of the infringing books by defendant (2 Tr. 34, 16-19, 27-29). Plaintiff was unable to calculate or fix the amount of its damage, and its attempts to estimate an amount were rejected by the trial court (2 Tr. 16-19, 27-29, 34-39), despite the fact that its sales generally declined and the value of its copyrights was lessened (2 Tr. 27-29, 33-35) because of these and other infringing acts.

The profits earned by defendant from the sales of the book could not be ascertained. Defendant sold one copy to Mr. Tempesta for \$25, but the sales prices of the other copies of the book were not known to defendant and it had no records concerning such sales (2 Tr. 81-84, 90-91). Thus, while defendant's record showed the cost of purchase of the books (\$5.75 for two and \$5.90 for the other two; Pltf. Exs. 8, 11 & 14), the lack of sales prices prevented even an estimation of gross profits.

It was undisputed that plaintiff was distributing and selling the infringing books for its own profit and gain (1 Tr. 229; 2 Tr. 59-60, 75). Defendant's President admitted that he had never before seen a "bargain" in music like this book (2 Tr. 103).

Plaintiff admitted its inability to prove the actual damages by reason of the infringing sales of the book and submitted all proof available as to defendant infringer's profit.

2. Questions Involved — Manner In Which The Same Are Raised

(1) Whether the District Court erred in failing to award to plaintiff minimum damages of \$250 for each of the twelve admitted copyright infringements by de-

fendant, a total of \$3,000, under the "in lieu" provisions of 17 U.S.C. Sec. 101(b)? This question was raised on plaintiff's objections to proposed findings of fact and conclusions of law (1 Tr. 220 et seq.) and arguments to the District Court (2 Tr. 128-144) and post-trial briefs filed with the District Court.

(2) Whether the District Court erred in holding that plaintiff was not entitled to an injunction against infringement by the defendant of plaintiff's twelve copyrighted musical compositions, under the provisions of 17 U.S.C. Sec. 101(a)? This question was raised as specified in the last preceding question, numbered (1) above.

(3) Whether the District Court erred in failing to order the defendant to deliver up to the court and plaintiff all copies of the infringing book or other infringing copies of plaintiff's musical compositions in defendant's possession or under its control? Also raised as specified in question numbered (1).

(4) Whether the District Court erred in awarding to the infringing defendant its costs and attorneys fees in the amount of \$1500? This question was raised by plaintiff's objections to proposed findings of fact and conclusions of law (1 Tr. 220 et seq.).

(5) Whether the following findings of the District Court are clearly erroneous and without substantial support from the evidence? The question as to the propriety of these findings was raised on plaintiff's objections to the proposed findings of fact and conclusions of law (1 Tr. 220 et seq.):

(a) That the total actual profits made by defendant are trivial, are ascertainable, and amount to approximately twenty-two cents from the sale of the twelve infringed songs. (F. 16; 1 Tr. 229).

(b) That the amount of damage suffered by plaintiff due to the infringements is ascertainable, that there was no evidence of any damage to plaintiff, and that plaintiff could not be damaged by the sale to Mr. Tempesta because he was an agent of plaintiff in purchasing the book and thus prevented the circularization of the copyrighted material to the public. (F. 17; 1 Tr. 230).

(c) That there was no credible evidence that plaintiff's twelve copyrighted musical compositions were any more or less valuable than the other songs in the infringing books. (F. 23; 1 Tr. 230).

(d) That Mr. T. Tempesta was an agent of plaintiff in going to defendant's store and in buying a book containing unauthorized copies of plaintiff's copyrighted musical compositions. (FF. 13, 14, 17 and 26; 1 Tr. 224-231).

(e) That the case went to trial in November 1964 on the issue of damages only. (F. 21; 1 Tr. 230).

(f) That plaintiff's prosecution of the case was not in good faith after February 28, 1964, was conducted without any reasonable belief in the merits thereof, and that plaintiff knew or should have known that its arguments lacked merit. (FF. 24, 26, 27; 1 Tr. 230-231).

(g) That the defendant is a small, family corporation with only three employees, and that there is a disparity between the financial resources of plaintiff and defendant. (F. 28; 1 Tr. 231).

(h) That there was no justification to conclude that there was any threat by defendant to continue to sell any of plaintiff's copyrighted musical compositions without plaintiff's permission. (F. 51; 1 Tr. 232).

(i) That there was sufficient basis to award attorneys fees to defendant in the amount of \$1500. (F. 24; 1 Tr. 231).

(j) That plaintiff should take nothing by way of relief. (F. 33; 1 Tr. 232).

(6) Whether the District Court erred in concluding that the amount plaintiff is entitled to recover in profits and damages is *de minimis*? This question was raised as specified in question numbered (1).

(7) Whether the District Court erred in concluding that, if either profits or damages are ascertainable, the minimum provided for in the “in lieu” provision of 17 U.S.C. Sec. 10(b) need not be resorted to? This question was raised as specified in question numbered (1).

(8) Whether the District Court erred in concluding that where exact proof of the infringer’s profit has been made and no other damages are shown for the infringement, there is no need to resort to the “in lieu” provisions of 17 U.S.C. Sec. 101(b). This question was raised as specified in question numbered (1).

(9) Whether the District Court erred in concluding that the defendant was the prevailing party and entitled to costs and a reasonable attorneys fee? This question was raised on plaintiff’s objection to the findings of fact and conclusions of law (1 Tr. 220 et seq.).

SPECIFICATION OF ERRORS

(1) The District Court erred in failing to award to plaintiff minimum damages of \$250 for each of the twelve admitted copyright infringements by defendant, a total of \$3,000, under the “in lieu” provisions of 17 U.S.C. § 101(b).

(2) The District Court erred in holding that plaintiff was not entitled to an injunction against infringement by the defendant of plaintiff's copyrighted musical compositions listed in the findings, under the provisions of 17 U.S.C. § 101(a).

(3) The District Court erred in failing to order the defendant to deliver up to the court and plaintiff all copies of the infringing work or other infringing copies of plaintiff's musical compositions in defendant's possession or under its control.

(4) The District Court erred in awarding defendant its costs and attorneys fees in the amount of \$1500.

(5) The following findings of the District Court are clearly erroneous and without substantial support from the evidence:

(a) That the total actual profits made by defendant are trivial, are ascertainable, and amount to approximately twenty-two cents from the sale of the twelve infringed songs (F. 16; 1 Tr. 229).

(b) That the amount of damage suffered by plaintiff due to the infringements is ascertainable, that there was no evidence of any damage to plaintiff, and that plaintiff could not be damaged by the sale to Mr. Tempesta because he was an agent of plaintiff in purchasing the book and thus prevented the circularization of the copyrighted material to the public. (F. 17; 1 Tr. 230)

(c) That there was no credible evidence that plaintiff's twelve copyrighted musical compositions were any more or less valuable than the other songs in the infringing books. (F. 23; 1 Tr. 230)

(d) That Mr. T. Tempesta was an agent of plaintiff in going to defendant's store and in buying a book con-

taining unauthorized copies of plaintiff's copyrighted musical compositions. (FF. 13, 14, 17 and 26; 1 Tr. 229-231).

(e) That the case went to trial in November 1964 on the issue of damages only. (F. 21; 1 Tr. 230)

(f) That plaintiff's prosecution of the case was not in good faith after February 28, 1964, was conducted without any reasonable belief in the merits thereof, and that plaintiff knew or should have known that its arguments lacked merit. (FF. 24, 26, 27; 1 Tr. 230-231).

(g) That the defendant is a small, family corporation with only three employees, and that there is a disparity between the financial resources of plaintiff and defendant. (F. 28; 1 Tr. 231).

(h) That there was no justification to conclude that there was any threat by defendant to continue to sell any of plaintiff's copyrighted musical compositions without plaintiff's permission. (F. 31; 1 Tr. 232).

(i) That there was sufficient basis to award attorneys fees to defendant in the amount of \$1500. (F. 29; 1 Tr. 231).

(j) That plaintiff should take nothing by way of relief. (F. 33; 1 Tr. 232).

(6) The District Court erred in concluding that the amount plaintiff is entitled to recover in profits and damages is *de minimis*.

(7) The District Court erred in concluding that, if either profits or damages are ascertainable, the minimum provided for in the "in lieu" provision of 17 U.S.C. Sec. 101(b) need not be resorted to.

(8) The District Court erred in concluding that where exact proof of the infringer's profit has been made and

no other damages are shown for the infringement, there is no need to resort to the “in lieu” provisions of 17 U.S.C. Sec. 101(b).

(9) The District Court erred in concluding that the defendant was the prevailing party and entitled to costs and a reasonable attorneys fee.

STATUTE INVOLVED

The only statute pertinent to a consideration of this action is Section 101 of the Copyright Act, 17 U.S.C., which states in relevant part:

“If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

“(a) Injunction.—To an injunction restraining such infringement;

“(b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy

given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

“First. In the case of a painting, statue, or sculpture, \$10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

“Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

“Third. In the case of a lecture, sermon, or address, \$50 for every infringing delivery;

“Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance; in the case of other musical compositions \$10 for every infringing performance;

“ . . .

“(d) Destruction of infringing copies and plates. — To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.”

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO AWARD TO PLAINTIFF MINIMUM STATUTORY DAMAGES OF \$250 FOR EACH OF THE TWELVE ADMITTED COPYRIGHT INFRINGEMENTS.

The Copyright Act gives a copyright owner the right against an infringer to recover *both* the actual damages that it may have suffered due to the infringement and all the profits which the infringer shall have made from the infringement. However, because Congress recognizes that proof of these matters is often difficult, if not impossible, it provided that “in lieu of actual damages and profits” the infringer must pay to the copyright owner an amount between a minimum of \$250 and a maximum of \$5,000. The amount of the award within those limits is in the court’s discretion. In the present case the court denied to plaintiff the right to any such “in lieu” award, despite the impossibility of proving its actual damages and the infringer’s profits.

The record reveals the manifest impossibility of translating the harm caused by the defendant’s infringements into terms of pecuniary compensation (2 Tr. 19, 33-38). Further, the nature of the exclusive rights given to a copyright owner by Section 1 of the Act (17 U.S.C. § 1) is such that no owner or expert can fix the dollar amount of damage caused by infringing sales with the certainty that the rules of evidence require.

The District Court reached its erroneous judgment by ignoring the uncontradicted evidence that plaintiff had been damaged (2 Tr. 34) and erroneously finding that damages were “ascertainable” but that “there is no evidence of any damage to the plaintiff” (1 Tr. 230). These findings are inconsistent as well as erroneous. The

court also erroneously found that the defendant's profits were ascertainable, to wit, twenty-two cents from the sale of one of the infringing books by defendant. The court also erred in ignoring defendant's other sales of the infringing book.

The denial to plaintiff of "in lieu" damages is contrary to the clear intent and purpose of the statute, contrary to the direct holdings of the United States Supreme Court, and contrary to the decisions of this Court and other courts of appeal.

A. The Purpose of the "In Lieu" Provisions of Section 101 Is to Provide a Just Remedy for Copyright Owners Who Are Unable to Prove Their Actual Damages as well as the Infringer's Profits.

The broad purpose of the "in lieu" provisions of Section 101 was simply stated by the Supreme Court in *Douglas v. Cunningham*, 294 U.S. 207 (1935):

"The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and *to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.* In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged wilful and deliberate infringement." (p. 209) (Emphasis here, as elsewhere, is supplied unless otherwise noted.)

The history of this provision of the Copyright Act was traced by the Supreme Court in an earlier, landmark

decision, *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919). Its origin is found in the Copyright Act of 1856, which required the infringer of a copyright in a dramatic composition to pay such damages "as to the court shall appear to be just" but *not less than* a prescribed amount. This section was enlarged in scope and the amounts changed in subsequent revisions of the copyright statute. Despite these changes, "the principle on which they proceeded — that of committing the amount of damages to be recovered to the court's discretion and sense of justice, *subject to prescribed limitations* — was retained. The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just.' Like both the old, it prescribes a *minimum* limitation and, like one, a *maximum* limitation." (249 U.S. at p. 107)

The purpose and intent of this statute, based upon earlier versions, was further enunciated in *Westermann*, by quoting from a decision under the former statute (*Brady v. Daly*, 175 U.S. 148):

"It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. *In the face of the difficulty of determining the amount of*

such damages in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. . . .

“‘Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained.’” (pp. 108-109)

B. The Supreme Court Has Consistently Held That it is Mandatory for a Court to Award Minimum Statutory Damages of \$250 Per Infringement When a Copyright Owner Does Not or Cannot Prove its Damages and the Infringer's Profits, If Any.

Under Section 101 of the Copyright Act, the copyright owner who proves infringement must recover either his actual damages and the infringer's profits or, in lieu thereof, statutory damages between the minimum of \$250 and the maximum of \$5,000. Under the first proviso, the copyright owner is entitled to *both* damages and profits, not just one of those elements. If both cannot be ascertained, then he has the election to take the statutory measure. Upon such election, the court must make an award in at least the minimum statutory amount for each infringement found. This was the square holding of the Supreme Court in three decisions, *Westermann Co. v. Dispatch Printing Co.*, *supra*, *Douglas v. Cunningham*,

supra, and *Jewell-LaSalle Realty Company v. Buck*, 283 U.S. 202 (1931).

In *Westermann*, the trial court awarded the copyright owner only nominal damages, \$10, for an innocent infringement by a publisher. There was no evidence of the amount of the owner's damages, there being "undisputed testimony" (as here) that damages could not be estimated or stated in dollars and cents. The Supreme Court noted that "whether the defendant made any profit from the publications does not appear."* The Supreme Court reversed the trial court's judgment, holding that plaintiff must be awarded the minimum statutory damages of \$250 for each of seven infringements.

"... In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them." (249 U.S. 100 at 106-107)

In *Douglas v. Cunningham*, *supra* where plaintiff copyright owner likewise admitted inability to prove actual damages and there was no evidence of defendant's profits, the Supreme Court affirmed the use of the statutory yardstick, holding that the trial court's discretion within those dollar limitations is not reviewable.

* The opinion of the Court of Appeals for the Sixth Circuit in the case (233 Fed. 609) states that "defendant made no profits so far as the proofs indicated." (233 Fed. Ct. 613).

One of the questions certified to the Supreme Court in *Jewell-LaSalle Realty Company v. Buck*, *supra*, was:

“In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of \$250 set out in the so-called “no other case” clause of Section 25(b) of the Copyright Act (17 U.S.C., Sec. 25), reading, “and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty?” ’ ’ (p. 203)*

The Court answered in the affirmative, in an opinion by Justice Brandeis. The Court said that it was “settled in *Westermann Co. v. Dispatch Printing Co.*, . . . that for each publication \$250 is the minimum damages.” It noted that the infringers argued that the rule was “burdensome and unreasonable” and that it had been “followed unwillingly” by the lower courts under the *Westermann* case. The Court answered that, if the provisions of the section have proved unreasonable, the remedy lies with Congress.

The most recent decision of the Supreme Court on construction of this statute expressly reaffirms and relies upon *Westermann* and *Douglas*. In *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952), it was proved that Woolworth innocently purchased some statuettes of a dog, not knowing that they infringed plaintiff’s copyrighted figurine. The gross profit of Woolworth from sale of its statuettes was \$899.16 (proved by evidence that satisfied the Court of Appeals and the Supreme Court). The trial court awarded the maximum statutory damages of \$5,000. Woolworth argued to the

* Sec. 25(b) of the Copyright Act was renumbered in the revision of 1947 and is now section 101(b).

Supreme Court that its liability was limited to the gross profit it had earned. "It argues that an infringing defendant, by coming forward with an undisputed admission of its own profit from the infringement, can tie the hands of the court and limit recovery to that amount. We cannot agree." The Court noted that the actual damages suffered by the plaintiff had not been adequately proved, but it did appear that a real and substantial injury had been inflicted. The Court's opinion notes that if the infringer's contention were sustained that profits may be the sole measure of liability as a matter of law, "such profits could be diminished even to the vanishing point . . . Moreover, a rule of liability which merely takes away the profits from an infringer would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." (344 U.S. at 233)

C. The Decisions of this Court and Other Courts of Appeal Are That a Plaintiff Must Be Awarded at Least Minimum Statutory Damages If He Is Unable to Prove His Actual Damages or the Infringer's Profits.

The courts of appeal which have had occasion to pass upon the construction of Section 101(b) of the Copyright Act have followed and developed the principle laid down in *Westermann*. That accord of opinion was likewise

ignored by the district court here in reaching its erroneous decision to deny plaintiff any damages.

This Court felt that the question was so well settled by 1933 that it summarily reversed a district court decision which, as here, had found infringement but denied the plaintiff any damages. In *Buck v. Bilkie*, 63 F.2d 447 (9 Cir. 1933), an assignee of a copyright for a musical composition had brought suit for infringement of that copyright, by a single public performance in a night club or tavern. An appeal was taken by the plaintiff copyright owner from that portion of the judgment which denied it any damages and attorneys fees. This Court said in a *per curiam* opinion:

“In the absence of proof of actual damages, an award of at least \$250 damages is mandatory. *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202, 51 S.Ct. 407, 75 L.Ed. 978, construing 17 U.S.C. § 25 (b), 17 USCA § 25(b), the Copyright Act § 25(b).

“Under Section 40 of the act (17 USCA § 40), ‘the Court may award to the prevailing party a reasonable attorney’s fee.’ Any such award is clearly discretionary: We find no abuse of discretion in the denial of attorneys’ fees, inasmuch as infringement ceased immediately on what defendant testified to have been the first notice received.

“The decree will be modified by adding thereto an award of the statutory minimum of \$250 damages, in addition to the costs.” (63 F.2d at 447)

Other circuit courts have been equally resolute in applying the principle that the copyright owner who is unable to prove his actual damages or the infringer’s profit must be awarded minimum statutory damages. The following are examples:

First Circuit — *Widenski v. Shapiro, Bernstein & Co., Inc.*, 147 F.2d 909 (1945); *Markham v. A. E. Borden Co., Inc.*, 221 F.2d 586 (1955); and *Chappell & Co., Inc. v. Palermo Cafe Co.*, 249 F.2d 77 (1957).

Second Circuit — *Russell & Stoll Co. v. Oceanic Electrical Supply Co., Inc.*, 80 F.2d 864 (1936); *Burndy Engineering Co., Inc. v. Sheldon Services Corp.*, 127 F.2d 661 (1942); and *Nikanov v. Simon & Schuster, Inc.*, 246 F.2d 501 (1957).

Fifth Circuit — *Irving Berlin, Inc. v. Daigle*, 31 F.2d 832 (1929); *Lutz v. Buck*, 40 F.2d 501 (1930); and *Universal Statuary Corporation v. Gaines*, 310 F.2d 647 (1962).

Seventh Circuit — *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (1929); and *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (1950).

Eighth Circuit — *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (1939); *Amsterdam Syndicate, Inc. v. Fuller*, 154 F.2d 342 (1946); and *Wihtol v. Crow*, 309 F.2d 777 (1962).

Indeed, a number of these decisions, as well as district court decisions, hold that a copyright owner unable to prove his actual damages must be awarded the minimum "in lieu" damages even though he makes *no* effort to prove the infringer's profits, or there is proof that *no* profits were made. These decisions will be discussed hereinafter. Plaintiff here made a good faith but fruitless effort to prove the defendant's profits, as well as a positive showing that its damages could not be calculated. Thus, plaintiff here undertook a much greater burden of proof than many cases hold sufficient to compel award of "in lieu" damages.

D. Plaintiff Here Was Unable to Prove Its Actual Damages and the Defendant Infringer's Profits Were Not Proved With Any Certainty.

1. Damages.

Finding No. 17 (1 Tr. 230) adopted by the District Court here reads:

“17. The amount of damage suffered by plaintiff due to the infringements is ascertainable. There is no evidence of any damage to the plaintiff. Indeed, it is difficult to see how the plaintiff could be damaged by the sale because plaintiff's own agent bought the Book, and thus prevented the circularization of the copyrighted material to the public.”

This finding is both self-contradictory and clearly erroneous.

The finding is contradictory in that, if there was no evidence of any damage to the plaintiff, the amount of the damages could not be ascertainable. The two are incompatible.

The finding is erroneous for the following reasons:

As to ascertainment of damages, plaintiff through its sales manager showed that there was no way to fix, much less estimate, the amount of damage suffered by plaintiff due to the sales of the books by defendant.

“Q As to the particular book before you, Plaintiff's Exhibit 1, do you know what has been the effect upon the plaintiff of the sale of that book?

“A On the specific book, no.

“BY MR. PRIEST:

“Q Do you know of any method of calculating any damage to the plaintiff arising as a result of

the sale of the book before you, Plaintiff's Exhibit 1?

"A It is very difficult to do this because there are potential customers, but we can never be sure that that customer would buy the specific song in this case." (2 Tr. pp. 18-19)

This testimony was not challenged in any way by defendant. Plaintiff's sales manager further testified that it was impossible to ascertain the amount of sales in a local area such as Los Angeles because the plaintiff sold to regional jobbers, who resold over a wide area of Southern California (2 Tr. pp. 36-38). Thus, it was impossible for plaintiff to fix or estimate the decline in sales of its songs that may have been attributable to defendant's infringing sales. Further, plaintiff's sales manager testified that there was other damage to plaintiff in its relationships with its composers and authors. This is intangible and cannot be measured in dollars and cents (2 Tr. pp. 33-35).

Also as to the impossibility of ascertaining damage, there was testimony that the retail price of the sheet music for each of defendant's copyrighted songs was sixty cents, whereas the price per song of the one book for which defendant had figures (the book sold to Tempesta) was two and one-half cents. The comparison in appearance and format of plaintiff's sheet music and authorized collection of songs (Pltf's Exs. 5, 6 & 7) with the shabby, unbound infringing "fake book" sold by defendant (Pltf's Ex. 1) shows in and of itself the intangible damage to plaintiff's exclusive right to vend. Who can deny that plaintiff's songs were cheapened and demeaned in the public's eye and mind by being sold in such a book? There is created an intangible depreciation and injury to the value of plaintiff's business which can-

not be measured by the simple differential in dollars and cents between sales prices.

Contrary to the second sentence of Finding No. 17, there was express evidence of damage to plaintiff. Plaintiff's sales manager testified:

"THE COURT: Is there any damage to the plaintiff from the sale of this particular book?

"THE WITNESS: Yes, your Honor.

"THE COURT: All right.

"THE WITNESS: There is an intangible loss. Violation of the copyright law which states we must have proper copyright notice of every printed copy or possibly we can lose our interest of ownership of that copyright.

"MR. HORNBAKER: I ask to strike that as being a legal opinion of the witness and an improper one in my opinion.

"MR. PRIEST: Let me hear the whole answer, please. I don't think you have completed your answer.

"THE WITNESS: No.

"THE COURT: I thought he had.

"THE WITNESS: Also in violation of contracts with our composers which state various stipulations.

"THE COURT: Well, all right. Now, let me hear his answer.

"(The answer was read by the reporter.)

"THE COURT: All right. What was your motion now? What was your motion?

“MR. HORNBAKER: Well, I move to strike the entire answer of the witness on the grounds that it is not limited to this particular book. I move to strike it on the further grounds that it calls for an opinion of the witness. I move to strike it on the further grounds that it calls for an answer which is not the best evidence. If these contracts so provide, then we should have the contracts here and not the testimony of this witness as to what is in the contracts. Now - -

“THE COURT: The motion is granted.” (2 Tr. pp. 34-36)

We understand the motion to have gone only to the explanation by the witness, not to his direct answer “Yes, your Honor”. The explanation of the witness was improperly stricken, because he was entitled to express the reasons for his opinions, he being the person best qualified to state the damage to plaintiff. An owner of property can testify to his belief that his property has been damaged, and the reasons therefor. *Kinter v. United States*, 156 F.2d 5, 7 (2 Cir. 1946). In addition to this testimony, there is further direct testimony by the witness of decline of sales, effects upon relations with the composers and authors, and harmful effects upon plaintiff’s copyrights (2 Tr. 16-19; 27-29; 34-39). This testimony was not disputed in any way by the defendant.

The songs in issue are plaintiff’s stock in trade, and it is actively trying to sell them in the Los Angeles area and throughout the United States, as sheet music and as part of small, legitimate collections. Sales by defendant of a cheap and shabby book of 1,000 songs, without plaintiff’s permission and without any payment whatever to plaintiff, clearly and directly injure the value of plaintiff’s copyrights. One of the two most valuable

rights conferred by the Copyright Act, that is, the exclusive right to vend, is destroyed by actions such as defendant's. There could be no more "actual" damage to plaintiff's copyrights. The short of it is that the plaintiff proved damage in *fact*; and the statute supplies the amount.

Therefore, there was substantial, undisputed evidence of damage to the plaintiff, making the second sentence of Finding No. 17 erroneous.

The third sentence of Finding No. 17 is likewise clearly erroneous, for several reasons.

1. It completely ignores the admission of defendant's President, Bleeker, that two other copies of the book were sold (2 Tr. 81), these sales being as much an ingredient of the infringement by defendant as the sale to Tempesta. Defendant did not know to whom these books were sold, and obviously they were members of the general public (2 Tr. 82-84, 115-116).

2. Tempesta was not an agent of the plaintiff. He was an employee of Music Publishers Protective Association, Inc., of which plaintiff is only one member among a number of music publishers (1 Tr. 118). While his duties included discovering sellers of illegal and infringing song books, such as those sold by defendant, there was *absolutely no evidence* that plaintiff knew in advance that Tempesta would visit defendant's store, that it had any direction or control over his activities, or that it did direct or authorize him to go to defendant's store. Tempesta would be an agent of plaintiff only if the evidence established that plaintiff here controlled or had the right to control his conduct with respect to the investigation of defendant's store. Restatement of Agency § 14; *Ledbetter v. Farmers Bank and Trust Co.*, 142 F.2d 147, 150 (4th Cir.

1944). The primary test of agency is the right of control. *Cox v. Kaufman*, 77 Cal.App.2d 449, 452 (1946). Further, there was no evidence of any agreement or consent between plaintiff and Tempesta whatever. "Agency is the fiduciary relation which results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement of Agency § 1; *Kosters v. Hoover*, 98 F.2d 595, 597 (App.B.C. 1938). Therefore, the findings of the court as to agency of Tempesta (1 Tr. pp. 229-230) are clearly erroneous.

3. Even if Tempesta were considered an agent, the offering for sale and sale of the infringing book would still be an infringement of plaintiff's copyright. There was no evidence that Tempesta knew or could have known that any one or more of the plaintiff's twelve copyrighted songs were contained in the book. The only evidence adduced as to Tempesta is contained in three paragraphs of stipulations of fact in the pre-trial conference order (1 Tr. p. 118) and the stipulation that defendant sold a copy of the infringing book to him on June 13, 1962 (1 Tr. pp. 116-117). If Tempesta did not know at the time of purchase that any of plaintiff's songs were in the books offered to him by defendant, then there could be no possibility of consent by plaintiff to the distribution and sale of the pirated songs. Hence, the copyright infringement was complete upon such sale, as it was upon the similar sales to other persons.*

* Deft. had no knowledge or information as to whether the other sales took place before or after the sale to Tempesta (2 Tr. 87-88).

2. Profits.

The district court held that the defendant's gross profit from the sale of one book (the sale to Tempesta) was \$19.10, that these gross profits on the one book should be apportioned equally among the 1,000 songs contained therein, and that, hence, defendant made a profit of twenty-two cents from the sale of the twelve infringed songs in the one book. The court's finding characterized the matter thus: "the actual profits made are trivial but are not difficult to ascertain." (F. 16; 1 Tr. pp. 229-230) Upon the basis of these erroneous findings the trial court held that it did not need to resort to the "in lieu" damage provisions of Section 101 of the Copyright Act (Conclusion of Law Nos. 4 & 5; 1 Tr. p. 232). This conclusion of the district court was likewise erroneous.

The court's finding as to a profit of twenty-two cents is erroneous primarily because it ignores the profit made by defendant on the sale of the other infringing books. Defendant had no records of such sales and its President testified that he had no means of knowing the sales price (2 Tr. pp. 81-84). Hence, even the gross profit could not be computed.*

The finding of profit on the one book sold to Tempesta is also erroneous because of the assumption that the gross profit of \$19.10 should be apportioned equally among all of the 1,000 songs. The finding was that plaintiff "offered no credible evidence at the trial to show that plaintiff's twelve copyrighted songs were any more

* The profits referred to in the statute are net profits (*Sheldon v. Metro-Goldwyn Pictures*, 309 U.S. 390), but the burden is upon the infringer to prove the costs incurred to arrive at a net profit. Here, the evidence expressly showed that deft. had no way of ascertaining such costs (2 Tr. 84-86). Thus, net profits also were not ascertainable.

or less valuable than the other songs in the Book. Nor did plaintiff offer any other credible evidence to show the profit on the book should not be apportioned equally among the songs therein." (F. 23; 1 Tr. 230). No such evidence was offered for the obvious reason that no person is qualified to judge or to estimate the relative value to the general public in any one section of the country of 1000 songs. Certainly, no witness, expert or otherwise, could testify that one or more songs in the book were the ones which the particular purchasers of these books desired. It would be impossible to ascertain which songs in the books were the ones which the purchasers particularly wanted to have for their use. In addition, the Court can ascertain for itself that many of the songs in the book are famous, whereas others are unknown, thus precluding an equal apportionment of gross profit (see the table of contents at the front of the book, Pltf. Ex. 1). Defendant's President admitted that there are a number of "famous" songs in the book (2 Tr. 104).

Courts have never attempted an equal apportionment of profits to all components of a book or newspaper in which one or a few components constitute infringing material. For example, in the *Westermann* case, neither the trial court nor the Supreme Court tried to apportion the defendant newspaper publisher's profits from the infringing advertisements as distinguished from the remainder of the newspaper. The Supreme Court contented itself with the statement: "Whether the defendant made any profit from the publications does not appear." (249 U.S. at 104) Likewise, in the following cases there was no attempt at an arbitrary, equal allocation of the gross profits of the infringer. *Burndy Engineering Co. v. Sheldon Service Corp.*, 127 F.2d 661 (2nd Cir. 1942); *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950); *Johns & Johns Printing Co. v. Paull-Pioneer*

Music Corp., 102 F.2d 282 (8th Cir. 1939); *Hedeman Products Corp. v. Tap-Rite Products Corp.*, 228 F.Supp. 630 (D.N.J. 1964);

E. Irrespective of the Amount of Defendant's Profits, Plaintiff Was Entitled to the Statutory Minimum Damages Because of Its Inability to Prove its Actual Damages.

Even if the defendant's profits were only twenty-two cents, or some similar, trivial figure, plaintiff would still be entitled to recovery of the statutory minimum of \$250 in order to compensate it for its *damages*. The statute unequivocally gives the right to *both* damages and profits. It has been strongly stated that the fact that an infringer's profits are negligible is no proof that the damages are negligible. There is no relationship between the two elements. *Sammons v. Larkin*, 126 F.2d 341, 345 (1 Cir., 1942). It has repeatedly been held that the statutory minimum damages must be awarded to a copyright owner for an infringement for which actual damage cannot be proved, *even if the infringer made no profit, or if the infringement is considered "trivial"*. *Markham v. A. E. Borden Co., Inc.*, 221 F.2d 586 (1st Cir. 1955); *Nikanov v. Simon & Schuster, Inc.*, 246 F.2d 501 (2nd Cir. 1957); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Cravens v. Retail Credit Men's Assn.*, 26 F.2d 833 (M.D.Tenn. 1924); *Eliot v. Geare-Marston, Inc.*, 30 F.Supp. 301 (E.D.Pa. 1939); *National Geographic Society v. Classified Geographic*, 27 F.Supp. 655 (D.Mass. 1939); *Sebring Pottery Co. v. Steubenville Pottery Co.*, 9 F.Supp. 384 (N.D. Ohio 1934); and *Towle v. Ross*, 32 F.Supp. 125 (D. Ore. 1940).

The circumstances in *Wihtol v. Crow*, *supra*, are closely analogous to those here. Plaintiff, who owned two copyrights of a hymn, claimed infringement by reason of the actions of a school teacher-choir director in making a

new arrangement of plaintiff's song, duplicating forty-eight copies of it on a school duplicating machine, and arranging for two performances of it, one by a high school chorus and one by a church choir. After the infringement was called to the teacher's attention, he surrendered all copies of the arrangement to the plaintiff. The trial court dismissed the complaint as against all defendants (the teacher, the school district and the church for which the choir made its single performance), and awarded costs and attorneys fees to them. The court of appeals reversed, despite the fact that it characterized the infringements as an "unfortunate but unintentional and seemingly harmless mistake" (309 F.2d at 780). It held that both the teacher and the church were jointly liable for the statutory damages of at least \$250. It further held that there were two infringements because there were two separate copyrights by the plaintiff of the same song, there being slightly different versions which the defendant had used. (309 F.2d at 782-783)

The holding of the District Court for Oregon, speaking through the late Judge James Alger Fee in *Towle v. Ross, supra*, is likewise apposite. There, the defendant government employees had made several photographic reproductions in their office of plaintiff's copyrighted map, but the reproductions were never used. Thus, there was no profit whatever to the infringers. In awarding the statutory minimum damage of \$250, the Court stated:

"The plaintiff is entitled to some damages on the mere showing of infringing acts. There must have been some actual damage, under the authorities, but this damage is without further proof raised to the statutory amount if the amount cannot be ascertained. The plaintiff has failed to prove any damage

to his general business, or any casual connection with the acts of defendants and its diminution. The loss of two sales may have been caused by the infringement.

“...

“The damages to be assessed are to be fixed by the trial court based upon the record. *The amount is discretionary if within the statutory limits. This rule was established in order to give more than nominal damages when the amount was incapable of proof.*” (32 F.Supp. at 128)

The public policy requiring that the copyright owner be given at least the minimum statutory damages of \$250 for each infringement even though the infringement be thought to be “trivial” has been clearly expressed by several courts, in addition to the decisions cited immediately above. In *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, *supra*, the court answered the infringer’s argument that the infringement was “technical only, wholly unintentional and trivial in nature” by saying that the chorus of a song is a material and substantial part of the work, that intention to infringe the copyright is not essential under the Copyright Act, and that a copyright owner “is entitled to recovery although the damages may be trivial” (102 F.2d at 283). Judge Learned Hand referred to a copyright infringement claim before him as a “trivial pother. . . , a mere point of honor, of scarcely more than irritation, involving no substantial interest. Except that it raises an interesting point of law, it would be a waste of time for everyone concerned. However, Section 25 [now Section 101 of the Copyright Act] fixes a minimum of \$250, which is absolute in all cases. . . Therefore, I must and do award that sum as damages.” (*Fred Fisher, Inc. v. Dillingham*, 298 Fed.

145, 152 (S.D.N.Y. 1924). See, also, *Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc.*, 184 F.Supp. 285, 287-288 (E.D. Pa. 1960).

Plaintiff did not “rest on its oars” in the trial below. It presented to the court all the evidence available as to defendant’s costs and its sales receipts, evidence which showed that the profits could not be ascertained. In numerous cases the courts have held that a copyright owner is entitled to the minimum statutory damages as a matter of right, even though he presents no evidence whatever of the defendant’s profits. *Westermann Co. v. Dispatch Printing Co.*, *supra*; *Douglas v. Cunningham*, *supra*; *Jewell-LaSalle Realty Co. v. Buck*, *supra*; *Buck v. Bilkie*, *supra*; *Widenski v. Shapiro*, *Bernstein & Co., Inc.*, *supra*; *Chappell & Co., Inc. v. Palermo Cafe Co.*, *supra*; *Russell & Stoll Co. v. Oceanic Electrical Supply Co., Inc.*, *supra*; *Irving Berlin, Inc. v. Daigle*, *supra*; *Lutz v. Buck*, *supra*; *Dreamland Ball Room, Inc. v. Shapiro*, *Bernstein & Co.*, *supra*; *Amsterdam Syndicate, Inc. v. Fuller*, *supra*; *Interstate Hotel Co. of Nebraska v. Remick Music Corp.* 157 F.2d 744 (8th Cir. 1946), cert. denied 329 U.S. 809 (1947); *Advertisers Exchange v. Hinkley*, 199 F.2d 313 (8th Cir. 1952), cert. denied 344 U.S. 921 (1952); *Buck v. Milam*, 32 F.2d 622 (D.Ida. 1929); *Doll v. Libin*, 17 F.Supp. 546 (D.Mont. 1936); *Law v. National Broadcasting Co.*, 51 F.Supp. 798 (S.D.N.Y. 1943); *Lindsay & Brewster, Inc. v. Verstein*, 21 F.Supp. 264 (D.Me. 1937); *Waterson, Berlin & Snyder Co. v. Tollefson*, 253 Fed. 859 (S.D.Cal. 1918); *M. Witmark & Sons v. Calloway*, 22 F.2d 412 (E.D.Tenn. 1927); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 Fed. 470 (E.D.So.Caro. 1924), aff’d, 2 F.2d 1020 (4th Cir. 1924); *Zenn v. National Golf Review, Inc.*, 27 F.Supp. 732 (S.D.N.Y. 1939).

In those cases there was no showing that it was impossible to prove the profits, yet the courts did not feel that it was proper to deprive the copyright owners of relief merely because they had failed to show the infringer's profits. If a copyright owner is entitled to the minimum statutory damages when he does not undertake the burden of presenting the available evidence of the infringer's profits, there clearly is no reason to disallow relief in the minimum statutory amount to the plaintiff here, who attempted in good faith to present to the court all such available evidence. The unfairness of the ruling below is apparent from comparison with decisions cited above.

Further, in some cases the courts have concluded both that no damages were proven or probable to the copyright owner and no profits to the infringer (or that the proof on profits was unsatisfactory), yet have held themselves compelled to award the copyright owner the minimum statutory damages. *Hedeman Products Corp. v. Tap-Rite Products Corp.*, *supra*; *Harry Alter Co. v. A. E. Borden Co.*, 121 F.Supp. 941 (D.Mass. 1954); and *Holdredge v. Knight Publishing Corp.*, 214 F.Supp. 921 (S.D.Cal. 1963).

F. Plaintiff Was Entitled to an Award of \$250 For Each of the Twelve Infringements.

We submit that the above review of the evidence and the decisions of the United States Supreme Court, the courts of appeal and the district courts have shown that plaintiff was entitled to recovery of at least the minimum amount of \$250 for each of the twelve admitted infringements. It was unable to prove its actual damages in dollars and cents, and the total profits of the defendant infringer could not be ascertained. Under *Westermann* and the succeeding decisions, the trial court

had no discretion but to award the minimum set forth in the statute.

However, even if the court's finding as to certainty of profits was correct, the award of the statutory minimum damages would still be required because of plaintiff's inability to prove its damages. Certainty of proof as to one of the elements does not limit a copyright owner to that amount, because he is entitled to both elements. If he cannot prove both, then he is entitled to elect the statutory award in lieu of actual damages *and* profits. This is shown by the decisions cited in Sections B, C, D and E hereinabove.*

* The decision of the court of appeals in the *Westermann* case stated the matter very well:

" . . . By the clause 'in lieu of' it contemplates an election or discretionary choice between actual damages and profits on the one side, and, on the other side, an assumed or somewhat arbitrary award of such damages as may be just. Plaintiff claims that the copyright proprietor is entitled to make this election, and to plant his action arbitrarily and absolutely upon one theory or the other; defendant insists that the election or the discretionary choice is to be made by the court upon the trial. The plaintiff here made the election, if he had the power to do so; and on the evidence there can be no doubt that this was not a case for actual damages, as distinguished from those damages which might be fair and just, and that the court, if called upon to act, must make the same election as plaintiff did. Defendant made no profits, so far as the proofs indicated; the plaintiff's damages rested in the injury to his Morehouse contract and in the discouragement of and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible. This case must therefore be treated, from any point of view, as one calling for the application of the 'in lieu' portion of the statute.

" . . .

"It seems to us the plain meaning of the language that Congress intended that the plaintiff should not recover less than

The district court below erroneously concluded that "if *either* profits or damages are ascertainable, the minimum provided for in the 'in lieu' provision need not be resorted to," citing *Sheldon v. Metro-Goldwyn Corp.*, 309 U.S. 390 (1940) (1 Tr. 232). This conclusion is erroneous. In *Sheldon* the Supreme Court affirmed a decision of the court of appeals holding that the plaintiff copyright owner was entitled only to one-fifth of the net profits of the defendants from their infringing motion picture, those net profits admittedly amounting to \$587,604. The issue before the Supreme Court was whether the copyright owner was entitled to all of the infringers' profits or only that portion which could fairly be attributable to the portions or elements of the copyrighted work which had been used. The Court held that an apportionment was required and that one-fifth was a fair allocation, based upon the expert testimony. The use of the "in lieu" damages under Section 101 was obviously not involved, because one-fifth of the profits exceeded the statutory maximum of \$5,000 by many times. (309 U.S. at 399) Such was the construction of the *Sheldon* case in the *Woolworth* decision (*supra*, 344 U.S. at 234).

Hence, it is not a question of ascertainment of *either* profits or damages, but the copyright owner is entitled to an award of the statutory damages unless *both* actual

\$250 damages in any copyright infringement suit not based upon a newspaper reproduction of a photograph — at least in any case where the actual damages fail to appear so clearly and so fully as to forbid resort to the 'in lieu' clause. The necessary effect of the provision is to prohibit the award of merely nominal damages. This intent implies no undue harshness. Not only does the typical copyright infringement, if not every one, involve indirect damages almost sure to be considerable, but in few cases would one sum of \$250 more than compensate plaintiff for his time, trouble and expense in detecting, following up and prosecuting an infringement. . . ." (233 Fed. 609, 612-614)

damages and profits are ascertained with sufficient certainty. Plaintiff here could not prove both, even under the trial court's erroneous view as to the infringer's profits, and therefore the award of the statutory minimum is compelled.

II. THE DISTRICT COURT ERRED IN FAILING TO GRANT AN INJUNCTION AGAINST INFRINGEMENT BY THE DEFENDANT OF PLAINTIFF'S COPYRIGHTED MUSICAL COMPOSITIONS.

Based upon a finding that "the court is not justified in concluding that there is any threat by the defendant to sell or continue to sell any of the copyrighted compositions, without plaintiff's permission," (F. 31; 1 Tr. 232) the district court denied plaintiff's request for an injunction (F. 32; 1 Tr. 232). Both the finding and the conclusion are clearly erroneous.

The testimony of the witness Bleeker, the President of defendant, showed that he had at least one of the infringing books remaining in his possession. While Mr. Bleeker testified that he did not intend to sell any more of the infringing books, plaintiff is plainly entitled to a court order holding him to that intention.

The mandate of Section 101(a) is clear and unequivocal. It provides that any person who shall infringe a copyright of any work protected under the copyright laws "shall be liable to an injunction restraining such infringement." There are no qualifications or modifications on this statutory direction, either based upon an infringer's expressed good intentions or otherwise.

It has consistently been held that the lack of any further "threat" by the infringer to continue the infringement does not justify the court in refusing an injunction, if the infringement has been proved.

“ . . . While there does not appear to be any immediate danger of further infringement, yet I am of opinion that the injunction should issue as a recognition of plaintiff's technical right under section 25 of the copyright statute (17 USCA § 25). . . .” *M. Witmark & Sons v. Calloway*, 22 F.2d 412, 414 (E.D. Tenn. 1927)).

See, also, *Fred Fisher, Inc. v. Dillingham*, *supra* (“the plaintiff may, of course, take the usual injunction, though under the circumstances it will apparently be of no service”) (298 Fed. at 152); and *Wihtol v. Crow*, *supra* (“while it seems highly improbable that, under the circumstances, there is the slightest danger of any of the defendants ever again copying or using the plaintiffs' song, the plaintiffs, no doubt, have the right to have their plea for an injunction considered and ruled upon by the trial court”) (309 F.2d at 783)).

III. THE DISTRICT COURT ERRED IN FAILING TO GIVE PLAINTIFF THE FURTHER RELIEF ACCORDED IT AS A COPYRIGHT OWNER UNDER SECTION 101(d) OF THE COPYRIGHT ACT.

In its amended complaint, the plaintiff requested the court's order that the defendant be ordered to deliver up to the court and plaintiff all infringing copies of the plaintiff's musical compositions in defendant's possession or under its control and to deliver up for destruction all plates, molds and other matter for making such infringing copies (1 Tr. p. 29). This was one of the issues of law included by the district court in the pretrial conference order (1 Tr. pp. 127-128).

The relief requested is that expressly given to the copyright owner under the direct language of Section 101(d) of the Copyright Act. The relief requested by the

plaintiff is almost a verbatim copy of that statutory provision.

The defendant admitted having at least one copy of the infringing book still in its possession at the time of trial, and it did not deliver this up to the court or plaintiff for destruction. Nor did it deliver or offer to deliver up any other unauthorized copies of any of plaintiff's copyrighted musical compositions which it might have. In the face of these circumstances, it was clear error for the district court to deny plaintiff this relief to which it is entitled.

IV. THE DISTRICT COURT ERRED IN AWARDING COSTS AND ATTORNEYS FEES TO THE INFRINGER.

The district court not only refused plaintiff the rightful relief to which it was entitled for the infringements, but granted the infringer its costs in full and attorneys fees in the amount of \$1500. This action is strikingly erroneous.

Apparently, there were two bases for the district court's award of costs and attorneys fees to the infringer. The first basis was findings that plaintiff's prosecution of the case "was not in good faith and was without any reasonable belief in the merits thereof." The court also found that the plaintiff knew or should have known that its arguments as to its damages and the infringer's profits, and the request for statutory damages, lacked merit (FF. 24, 26 and 27; 1 Tr. 230-231). The second basis was that defendant had offered before trial a judgment in the amount of \$50, which had been rejected by plaintiff. Since the court concluded that plaintiff was entitled to nothing, it held that the defendant was the prevailing party, entitled to its costs and attorneys fees (1 Tr. pp. 230-233).

In view of the Supreme Court, court of appeals and district courts decisions cited above, each allowing the copyright owner statutory damages and injunctive relief for infringements no more serious than those committed by defendant here, it is mildly amazing to find the district court, while finding infringement, nevertheless holding that plaintiff's prosecution of its rights was not in good faith and was without any reasonable belief in the merits thereof. The effect of the district court's finding is to penalize and effectively to prohibit any copyright owner from protecting his copyrights by judicial action unless the infringements concern thousands of dollars of damages or profits. Such an attitude is so clearly antagonistic to the intent of Congress expressed in the Copyright Act that it beggars description. The good faith of plaintiff and the reason for belief in the merits of its case is evident from the *Westermann* case alone, as well as the decision of this Court in *Buck v. Bilkie*, *supra*, and the decisions of other Courts of Appeal such as *Wihtol v. Crow*, *supra*, and *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, *supra*. If plaintiff was not entitled to present arguments based upon these cases to the court in support of its request for relief, then it has, from a practical standpoint, been denied its day in court.

The district court cited two cases in support of its basis for awarding the infringer costs and attorneys fees: *Talon v. Union Slide Fastener*, 266 F.2d 731 (9th Cir. 1959), *Shingle Products v. Gleason*, 211 F.2d 437 (9th Cir. 1954). Neither case is authority for an award in the circumstances of the present case. Both of them involved the alleged infringements of patents, and in both cases the trial court and the court of appeals held that the patents were invalid. Here, pltf's copyrights were admittedly valid and infringed. In the *Shingle* case, moreover, the

evidence showed an apparent admission of invalidity during the pendency of the appeal. Further, the court found that the plaintiff corporation had been set up without assets “solely” to bring harassing actions for patent infringement on the invalid patents. In the present case, to the contrary, pltf. corporation was solely in business to sell music, and the action was necessary to preserve its copyrights and to prevent further damaging sales of pirated versions of its songs. Plaintiff was certainly entitled and was obviously in good faith in proceeding before the district court for a determination of its right to injunctive relief, to statutory damages, and to the other relief expressly given it by the copyright statutes.

Indeed, if there is any analogy to the patent cases, the analogy is more properly to decisions such as *Park-In Theatres, Inc. v. Perkins*, 190 F.2d 137 (9th Cir. 1951), in which this Court stated that attorneys fees should be awarded to a successful defendant in a patent infringement case only when it was “grossly unjust” that the successful defendant be left to bear the burden of his own counsel fees.

Nor was there any fair basis for an award of attorneys fees by reason of defendant’s offer of settlement before trial. That offer was for \$50 only, without any injunction, without surrender of the infringing works still in the possession of the defendant, and without the statutory damages. (1 Tr. p. 230). Plaintiff clearly was in good faith and in good judgment in rejecting this offer and proceeding to trial. Even if plaintiff were held not entitled to statutory damages (to which it is clearly entitled), it would be entitled to the injunction and equitable relief set forth in the statute. This the defendant did not offer. Plaintiff should not now be

penalized \$1500 and other costs by reason of its rightful rejection of this pretrial settlement offer.

There is a suggestion in the court's findings and conclusions of a possible third basis for the award of attorneys fees, that of an alleged wide disparity between the economic stature of plaintiff and of the defendant (F. 28 and Conclusion of Law 10; 1 Tr. pp. 231, 233). Finding No. 28 is clearly in error in stating "the court takes judicial notice of the disparity between the financial resources of plaintiff and the defendant." There was absolutely no evidence in the record of the financial resources of plaintiff, either by way of its assets or its income. Further, the court cannot take judicial notice of such obviously private facts as the financial size of a party. That is a matter of evidence, and there was no evidence concerning it. Hence, both the finding and the conclusion are clearly erroneous.

CONCLUSION

Despite the admitted multiple infringements by defendant of plaintiff's valid copyrights in its valuable musical compositions, the district court refused any relief whatever and rewarded the infringer by giving it its costs and attorneys fees. Such a result effectively destroys the value of plaintiff's copyrights and deprives it of the protection which Congress fully intended to give to persons who contribute original music, literature and works of art to the public. Congress has foreseen situations like that facing the plaintiff, in which the copyright owner would be unable to prove the actual damage to its copyrights by reason of the strict rules of law concerning such proof, and has provided a remedy in lieu thereof. That "in lieu" remedy within minimum and maximum limitations is by contemplation of law "just" (*Douglas v. Cunningham, supra*). It does not matter

whether the infringement be considered trivial or substantial by the court, the copyright owner is entitled to the minimum protection given by the statute. The trial court has here wrongfully refused relief for the wrong done to plaintiff, which was an actual damage to its business and copyrights. The decision is clearly erroneous and should be reversed with costs on appeal to the plaintiff.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHAPIRO, BERNSTEIN & CO., INC.,

Appellant,

vs.

4636 S. VERMONT AVE., INC., a
California corporation, doing business
as REED'S MUSIC STORE,

Appellee.

FEB 10 1967

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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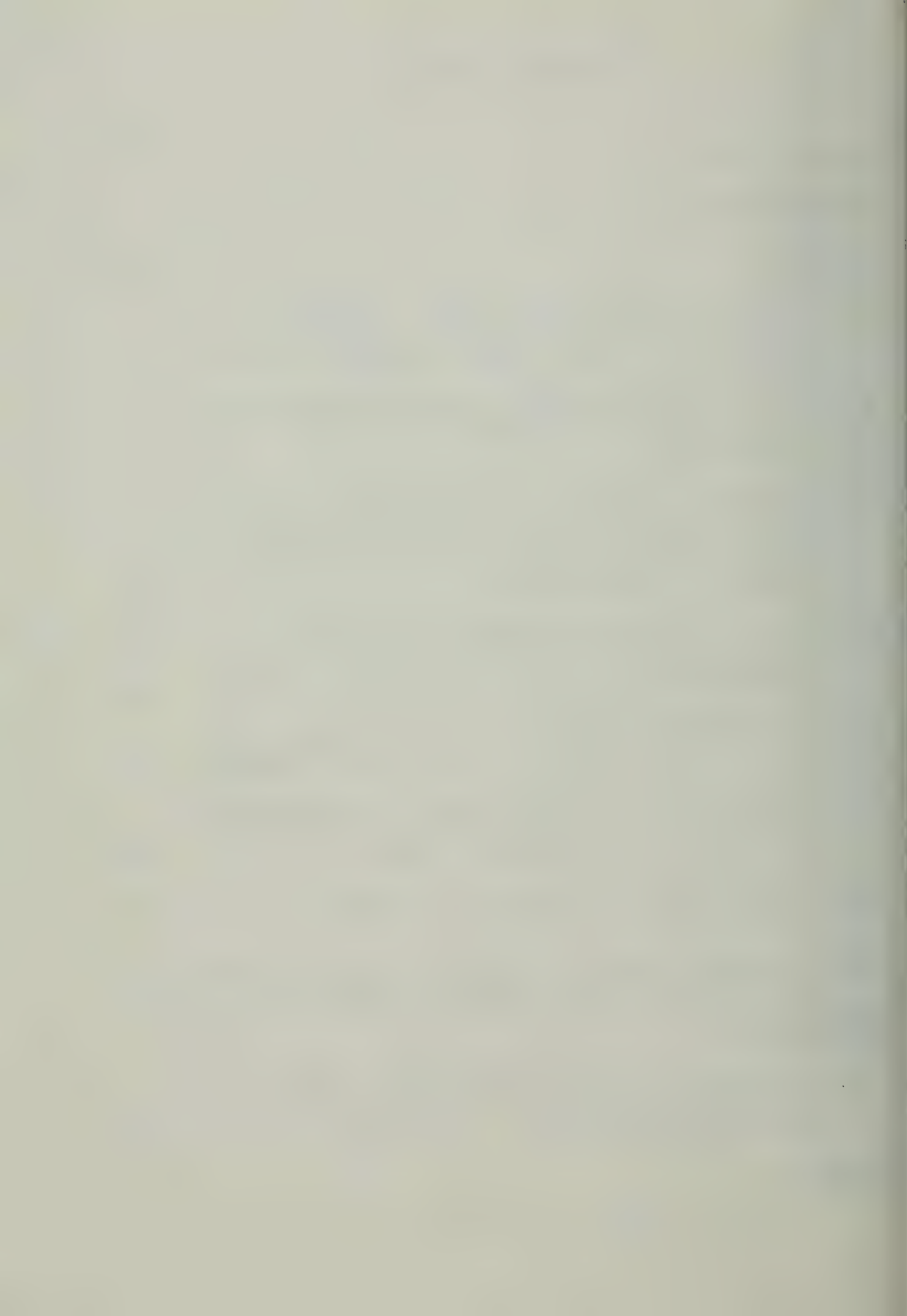
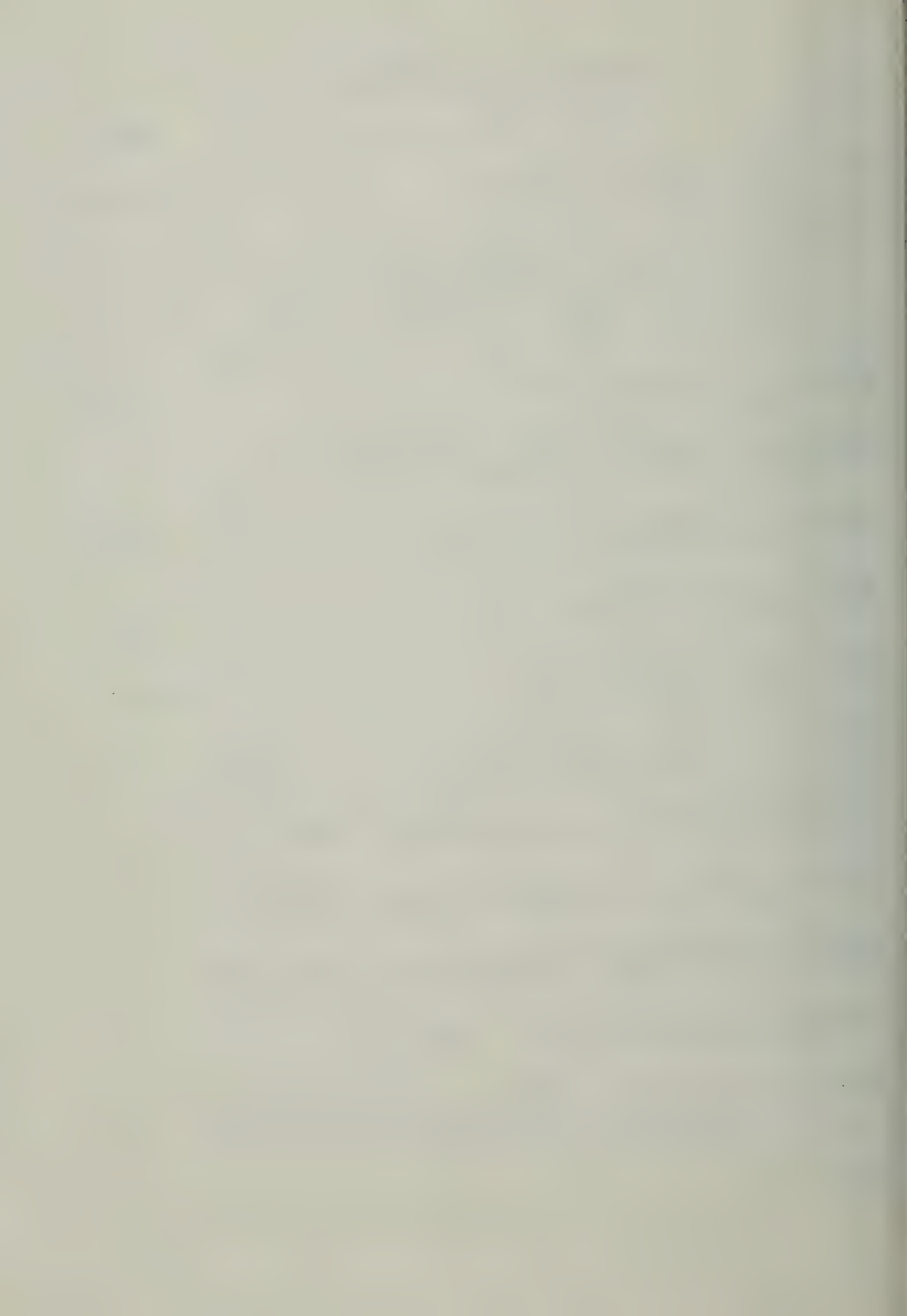


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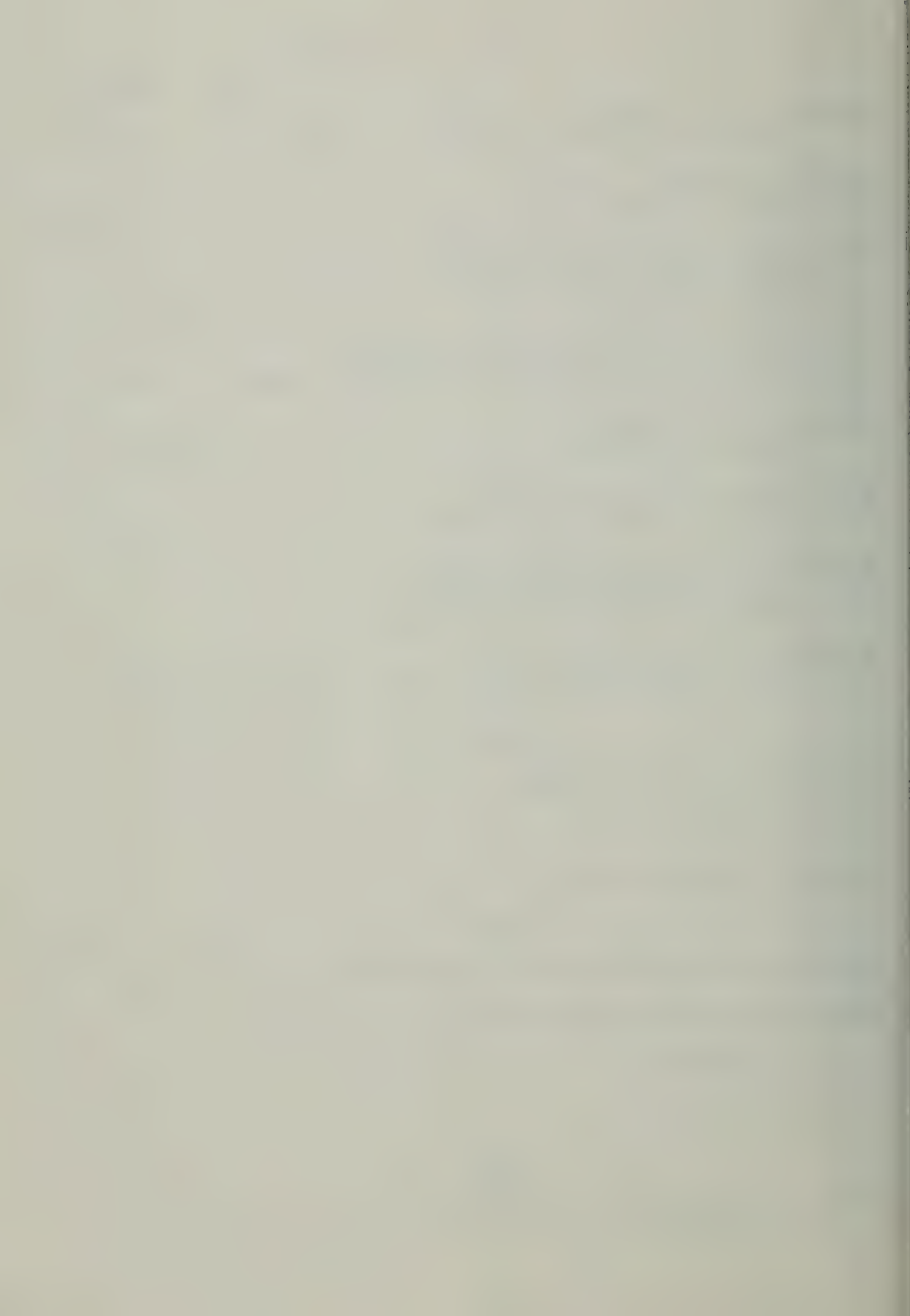
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHAPIRO, BERNSTEIN & CO., INC.,

Appellant,

vs.

4636 S. VERMONT AVE., INC., A
California corporation, doing business
as REED'S MUSIC STORE,

Appellee.

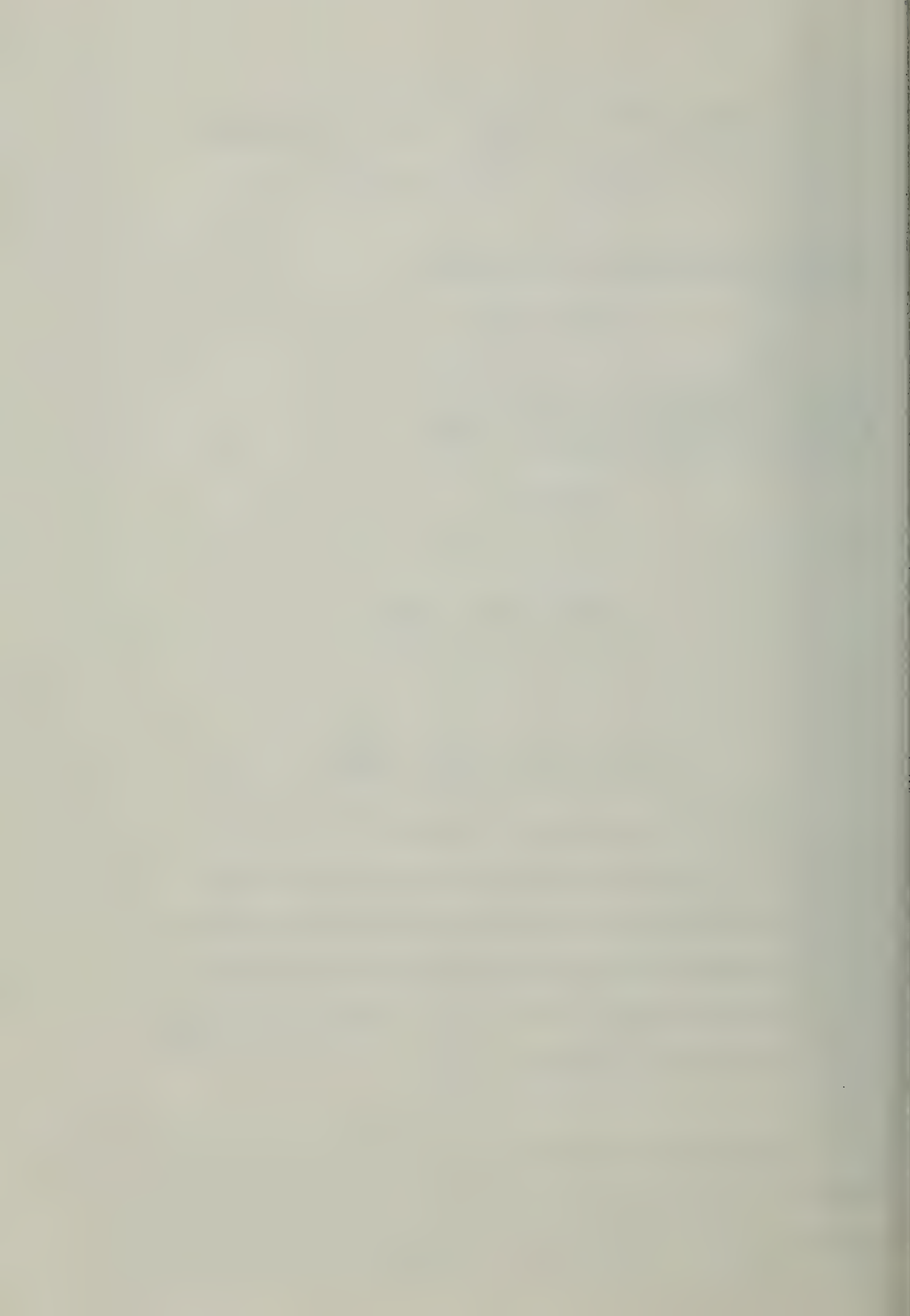
APPELLEE'S BRIEF

STATEMENT OF THE CASE

Plaintiff says on page 1 of its brief:

"This case presents the strikingly unusual situation where a party was found guilty of copyright infringement but the copyright owner was awarded no relief against it, as a result of which the infringer was awarded its attorneys fees."

Defendant agrees that this case is a strikingly unusual situation -- one in which the plaintiff abused the judicial process by bringing suit in bad faith for the purpose of using its superior



economic power to overwhelm a defendant and establish bad precedent favorable to plaintiff. 1/

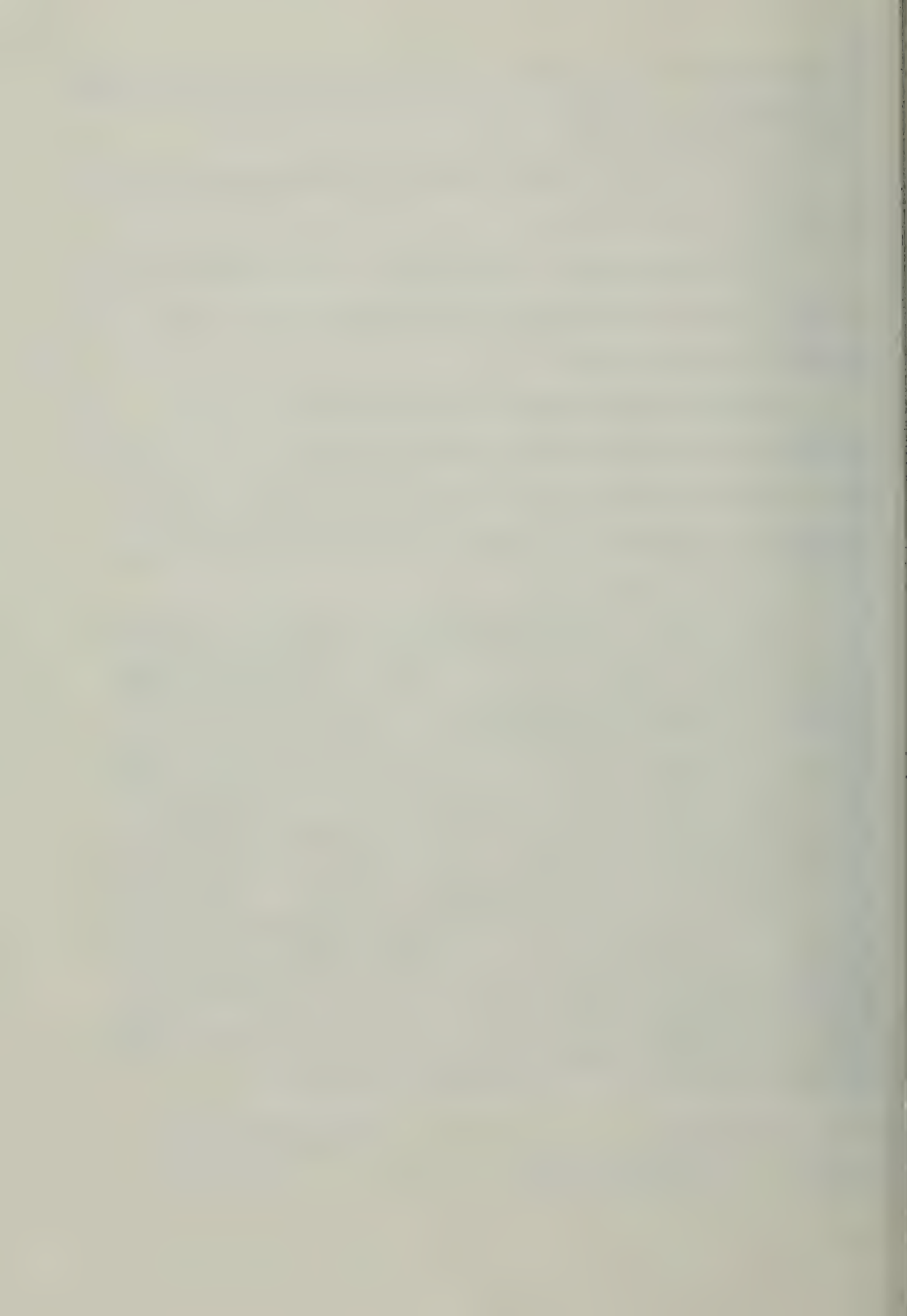
The facts upon which the experienced Chief Judge based his decision are as follows:

Defendant is a small family corporation having three employees. Mr. Bleeker is the president and his wife is vice-president (2 Tr. 52-55). 2/

Defendant is primarily engaged in the sale of pianos, organs and other instruments but about one-half of one per cent (0.00 1/2%) of its total sales is musical compositions, mostly instruction books (2 Tr. 53, 58-59, 86, 110; Opinion, attached

1/ Plaintiff is engaged in the business of printing, publishing and vending copyrighted musical compositions. It has often used the courts to enforce its rights. See Dreamland Ball Room v. Shapiro Bernstein & Co., 36 F.2d 354 (7th Cir. 1929); Widenski v. Shapiro, Bernstein & Co., 54 F. Supp. 780 (D. R. I. 1944) aff'd. 147 F.2d 909 (1st Cir. 1945); Shapiro, Bernstein v. Bryan, 36 F. Supp. 544 (S. D. N. Y. 1940) aff'd. 123 F.2d 697 (2nd Cir. 1941); Shapiro, Bernstein v. Goody, 248 F.2d 260 (2nd Cir. 1957), cert. denied 355 U.S. 952 (1958); Shapiro, Bernstein v. Jerry Vogel, 161 F.2d 406 (2nd Cir. 1946), cert. denied 331 U.S. 820 (1947); Shapiro Bernstein v. Jerry Vogel, 115 F. Supp. 754 (S. D. N. Y. 1953), rev'd. 22, 1 F.2d 569 (2nd Cir. 1955), revised 223 F.2d 252 (2nd Cir. 1955); Shapiro, Bernstein v. Jerry Vogel, 73 F. Supp. 165 (S. D. N. Y. 1947); Shapiro, Bernstein v. Miracle Record, 91 F. Supp. 473 (N. D. Ill. 1950); Shapiro, Bernstein v. Remington Records, 265 F.2d 263 (2nd Cir. 1959); Shapiro, Bernstein v. Royal Plastics, 81 F. Supp. 555 (S. D. N. Y. 1948); Shapiro, Bernstein v. Veltin, 47 F. Supp. 648 (W. D. La. 1942); Shapiro, Bernstein v. H. L. Green, 316 F.2d 304 (2nd Cir. 1963); Shapiro, Bernstein v. Middletown Farmers Market, 334 F.2d 303 (3rd Cir. 1964).

2/ Reference is to Volume 2 of the Transcript of Record, the Reporter's Transcript. Defendant has adopted the designations used by plaintiff.



as Appendix B ^{3/}).

Mr. Bleeker purchased four similarly-titled "fake" books ^{4/} from Mel Alan ^{5/}, a salesman who solicited Mr. Bleeker's business in Mr. Bleeker's store (2 Tr. 56-58, 113). One of these books is the book in suit, Plaintiff's Ex. 1 (2 Tr. 97, 114). Mr. Bleeker purchased it on or about May 31, 1962 (Pltfs. Ex. 14).

Mr. Bleeker did not look inside the books for a copyright notice (2 Tr. 100). He did not pay any attention to whether there was a publisher indicated or a date or place of publication (2 Tr. 100). He did not look to see if credits were given to the composer, author or publisher on the songs (2 Tr. 102).

Mr. Bleeker said (2 Tr. 125):

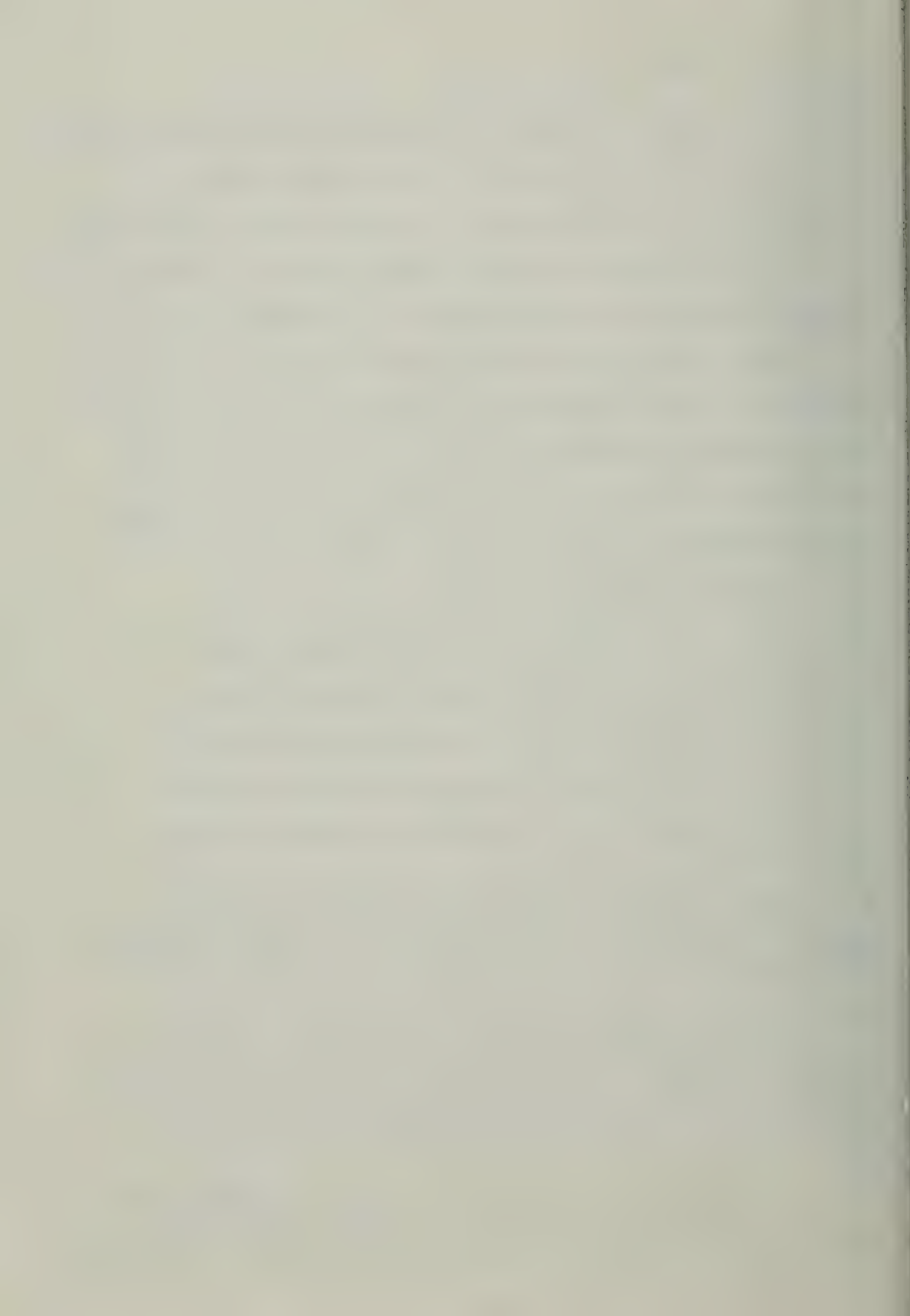
"A. Well, I just took for granted that he had the right to sell the books and which in turn should give me the right to sell them to the public.

"Q. I see. Even though his name doesn't appear anywhere on the books or any other publisher's

^{3/} Judge Hall wrote two opinions: the first is reported in 224 F. Supp. 595, 140 USPQ 111 (S.D. Calif. 1963), attached as Appendix A; the second is reported in 224 F. Supp. 595, 146 USPQ 152 (S.D. Calif. 1965), attached as Appendix B.

^{4/} "Fake" book has no sinister connotation in the music business. When a musician is requested to play a number he plays the melody from memory and fakes in the harmony (2 Tr. 110-111). A "fake" book is a collection of melodies used to supplement the musician's memory. There are several legally authorized "fake" books on the market (2 Tr. 33, 39, 45-47).

^{5/} Mel Alan was subsequently indicted and convicted of wilfull infringement under Sec. 104 of the Copyright Act and his probationary sentence revoked (2 Tr. 22-23) -- perhaps as a result of Mr. Bleeker's complete cooperation with the plaintiff in this case.



name or distributor's name?

"A. Yes, sir. I felt he had the right to sell them to me."

Mr. Bleeker paid \$5.90 for Pltfs. Ex. 1 (2 Tr. 114, lines 19-21; Pltfs. Ex. 14).

He then displayed it in a public showcase (2 Tr. 79-80, 115-116).

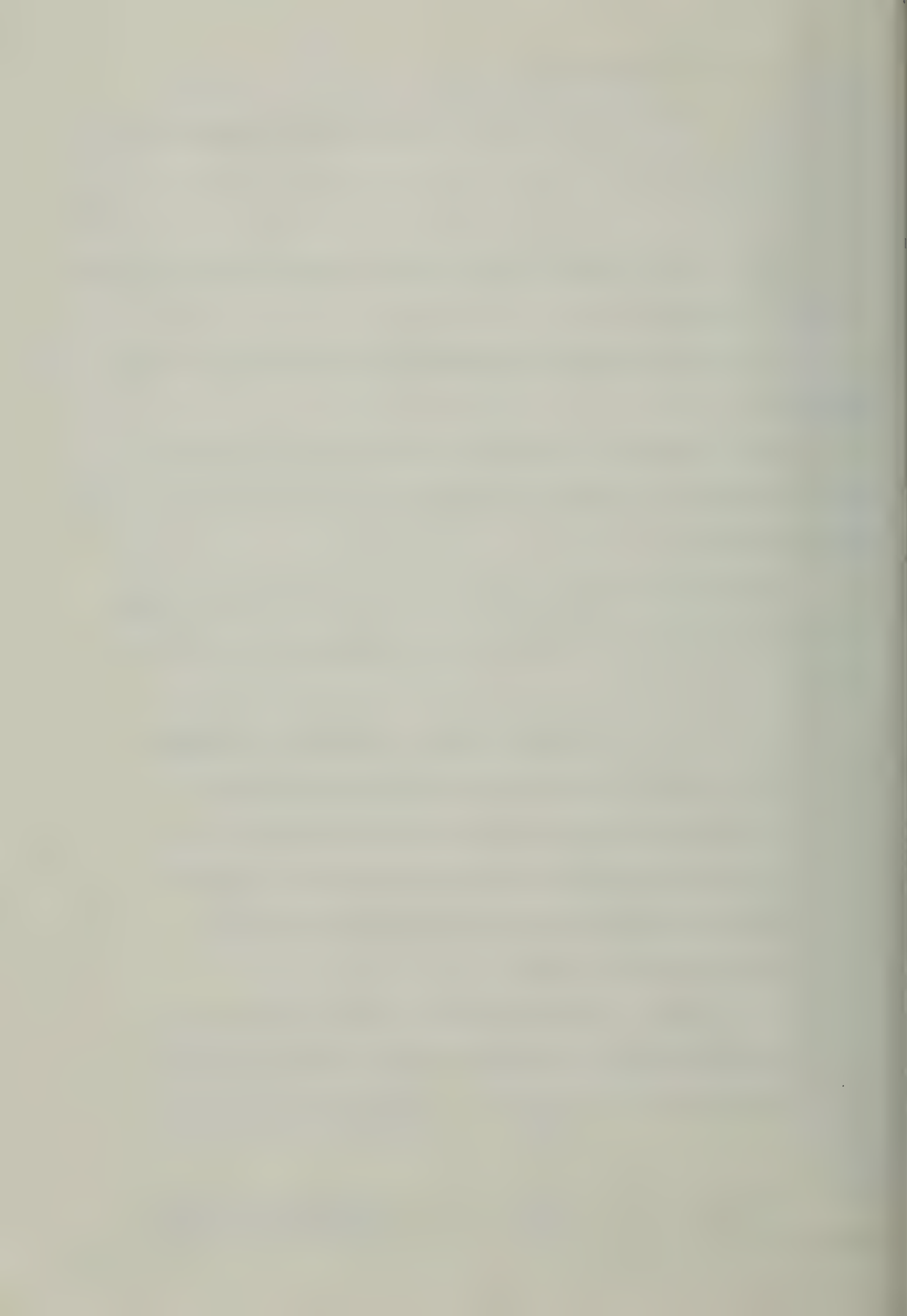
Mr. John Duvall, defendant's salesman, sold Pltfs. Ex. 1 to Mr. Tempesta on June 13, 1962 for \$25 plus \$1 tax (2 Tr. 115, Pltfs. Ex. 2).

Paragraphs 3 (i) - (k) of the Pre-trial Conference Order state Mr. Tempesta's relationship to the plaintiff (1 Tr. 118-119 ^{6/}):

"(i) During the year 1962 said T. Tempesta was regularly employed as an investigator by the Music Publishers Protective Association, Inc., a non-profit organization whose membership consists of numerous music publishers including Shapiro, Bernstein & Co., Inc.,

"(j) Said Tempesta's duties included discovering sellers of certain illegal and infringing song books known in the trade as 'Fake Books' containing

^{6/} Reference is to Volume 1 of the Transcript of Record, the Clerk's Transcript. Defendant has adopted the designations used by plaintiff.



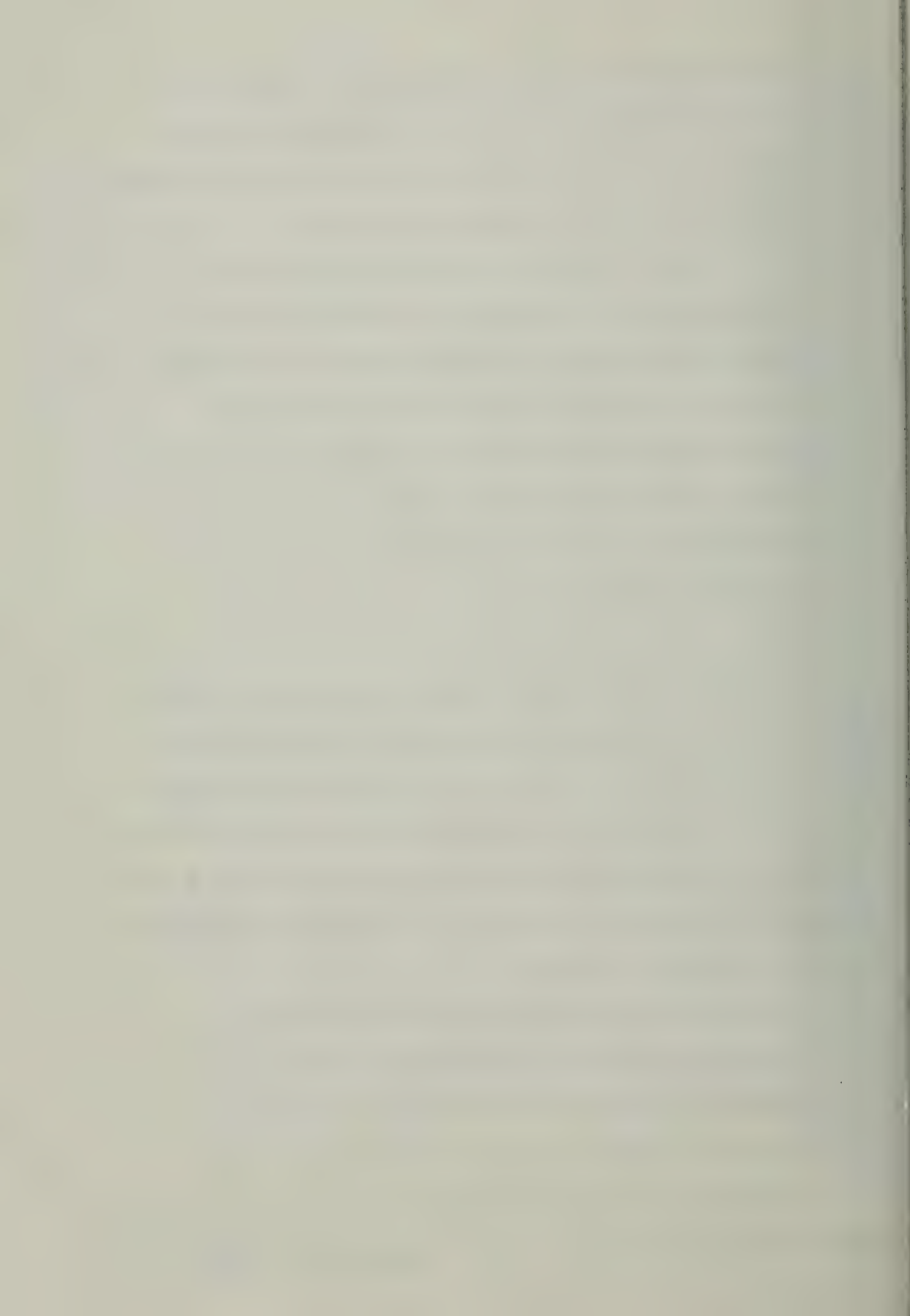
the copyrighted musical compositions of members of the Music Publishers Protective Association, which books are printed, published and sold without the consent or permission of the copyright proprietors.

"(k) On June 13, 1962, in the course of his employment, said Tempesta entered Reed's Music Store at 4636 S. Vermont Avenue, Los Angeles, California, for the purpose of discovering whether such establishment sold or was offering for sale song books containing unauthorized copies of musical compositions of the Music Publisher's Protective Association members. "

Plaintiff did not call Mr. Tempesta as a witness. The Court found in his own handwriting that Mr. Tempesta was an agent of the plaintiff (1 Tr. 229). Even if the Pre-Trial Conference Order was not technically an admission of agency, the Court was justified in drawing the inference, especially in view of plaintiff's failure to call Mr. Tempesta. Cf. 5 Moore's Federal Practice, Para. 52.06(1), p. 2661:

"Findings of the trial court 'are to be construed liberally in support of a judgment or order. . . .'
Whenever, from the facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn. "

These inferences are findings of fact. Weyl - Zuckerman v.



Commissioner, 232 F.2d 214 (9th Cir. 1956) ["We are of the opinion that the so-called inferences drawn from other facts were still findings of fact within the meaning of Rule 52(a)."].

Plaintiffs often cite Paragraph 5(d) of the Pre-Trial Conference Order (1 Tr. 120) to the effect that the act of defendant in selling the book was without "the previous solicitation, procurement, knowledge" etc. of plaintiff. See, e. g., page 5 of plaintiff's brief. In view of the preceding Paragraphs 3 (i) - (k), however, the only logical conclusion is that "previous" meant prior to the day of sale, thereby making it clear that the plaintiff had not requested defendant to special order the book. In this connection, plaintiff drafted Paragraph 5(d) under the requirement of Local Rule 9(j) and it should be strictly construed against them. Rohr Aircraft v. Rubber Teck, 163 F.Supp. 787, 789, 118 USPQ 8, 9 (S. D. Calif. 1957), aff'd. 266 F.2d 613, 121 USPQ 241 (9th Cir. 1959); Kresge v. Davies, 112 F.2d 708, 710-711, 46 USPQ 116, 118 (8th Cir. 1940).

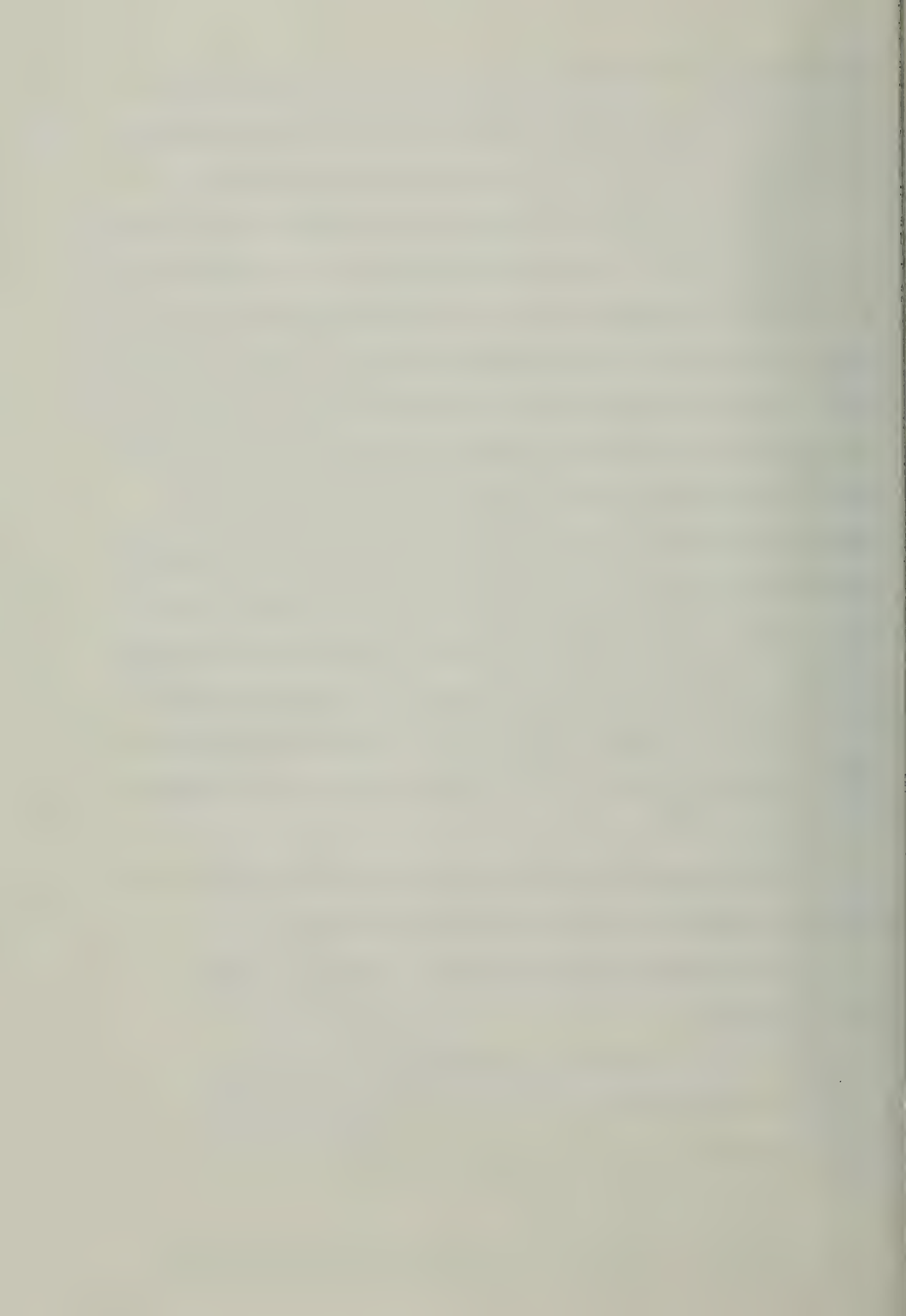
The strikingly inequitable part of this case is that defendant was an innocent and totally blameless infringer.

On the witness stand Mr. Bleeker testified as follows (2 Tr. 119-122):

"Q. Did the plaintiffs give you any notice that you were infringing on their copyright prior to the time that they served the complaint on you?

"A. No, sir.

"Q. Did the plaintiffs or anyone else advise



you to be on the lookout for copyright infringements?

"A. No, sir.

"Q. Or for fake books?

"A. No, sir.

"Q. Did you know that fake books are copyright infringements?

"A. No, sir.

"Q. Did you know that the plaintiffs or anyone else had any rights in Exhibit 1 at the time you purchased that book from Mr. Mel Alan?

"A. No, sir.

"Q. Did you know that the purchase and sale of Exhibit 1 or any other of the other books that you purchased from Mel Alan would infringe on any rights of the plaintiffs or any other persons at the time you bought them?

"A. No, sir.

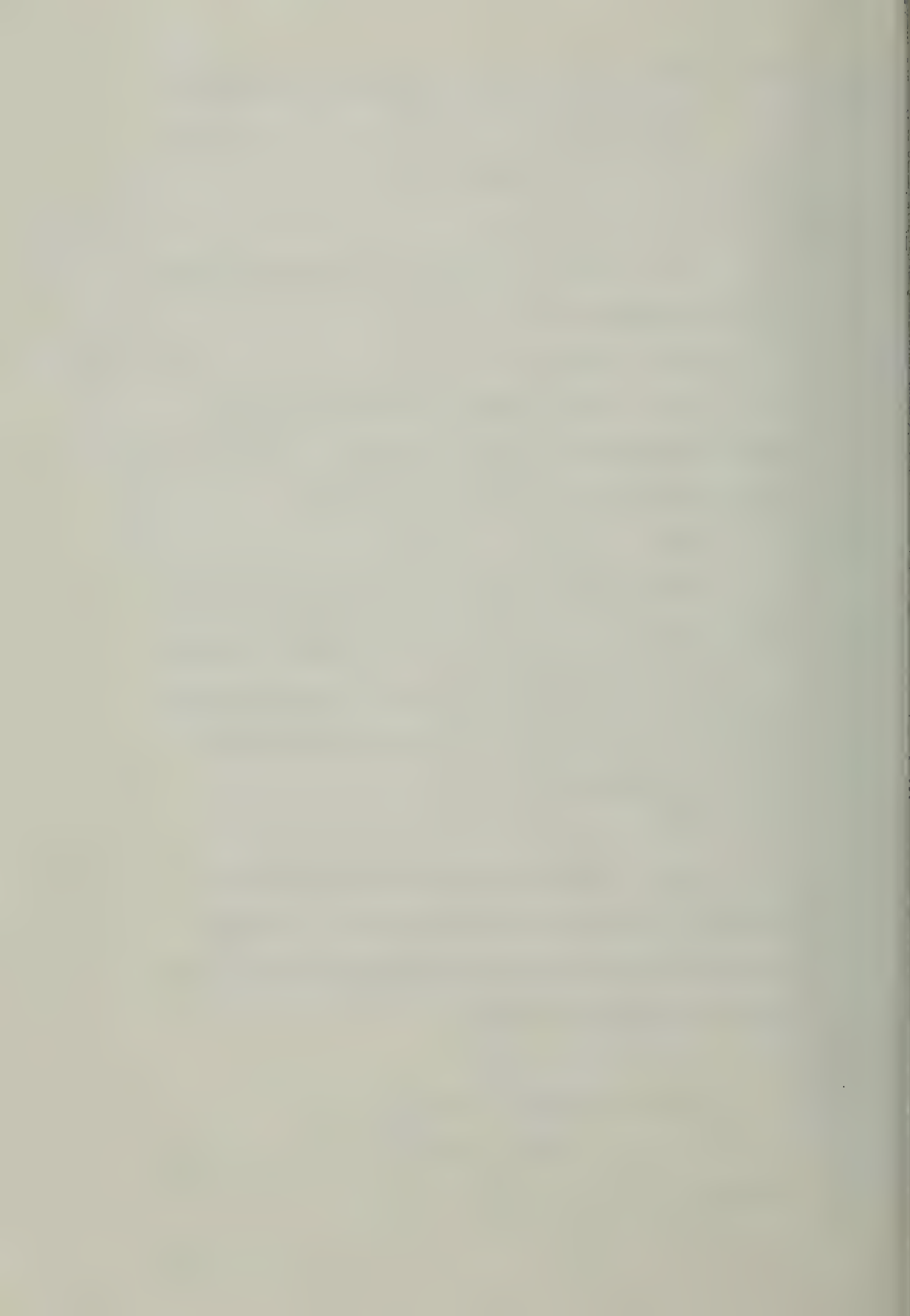
"Q. Did you know that the publishers of Exhibit 1 or any of the other books that you bought from Mel Alan were infringing any rights of the plaintiffs or any other persons?

* * *

"THE WITNESS: No, sir.

"Q. BY MR. HORNBAKER: Did you intend to infringe on the plaintiff's copyright?

"A. No, sir.



* * *

"Q. BY MR. HORNBAKER: Did you copy any of the songs that were in the books that you purchased from Mr. Mel Alan including Exhibit 1?

"No, sir.

* * *

"Q. BY MR. HORNBAKER: Did you make the reproduction of the songs that appeared in the books that you bought from Mr. Mel Alan?

"A. No, sir.

"Q. Since the complaint was served on you, have you sold any fake books?

"A. No, sir.

"Q. Do you intend to?

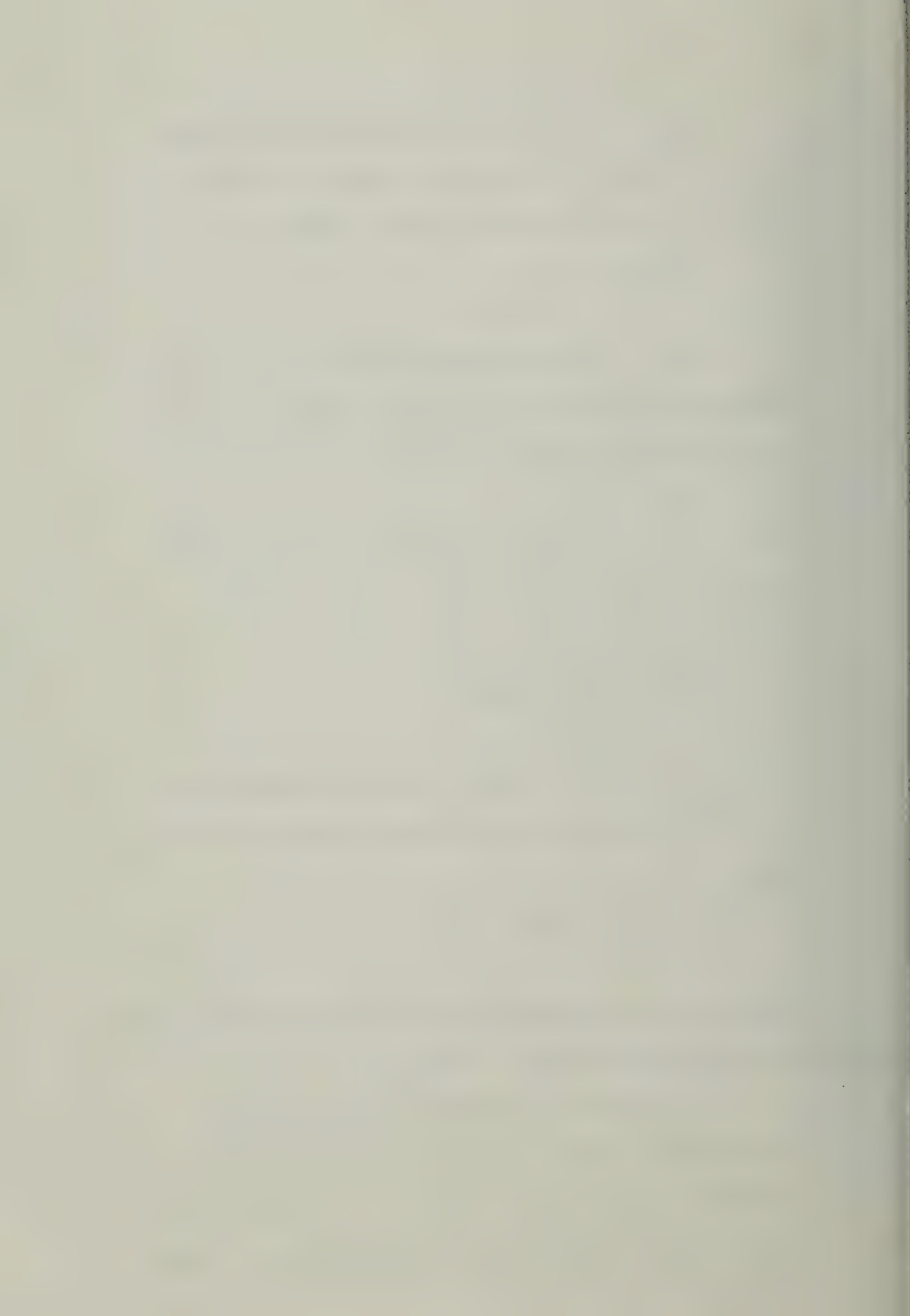
"A. No, sir.

"Q. At the time Mr. Duvall sold Exhibit No. 1, did you know Mr. Mel Alan had been convicted of anything?

"A. No, sir."

After hearing this testimony and judging the credibility of the witness the Court found that (Tr. 230):

"18. Prior to the service of the summons and complaint in this action, the defendant did not know that the songs in the Book were copyrights, did not know that the plaintiff or anyone else had any rights



in the songs, did not know that the purchase and sale of the Book would infringe any rights of plaintiff or any other person, and did not know that the publishers of the Book were infringing any rights of plaintiff.

"19. The acts of defendant in selling, distributing and vending the Book were committed without knowledge of the rights and copyrights of plaintiff in and to each of the musical compositions.

"20. Defendant did not intend to infringe."

Plaintiff offered no evidence that any of the four books other than Pltfs. Ex. 1 contained any of Plaintiff's copyrighted songs. ^{7/} Mr. Bleeker still has one of the four (2 Tr. 97, 114), which he has offered to be impounded (Opinion, fn. 1, Appendix B). Yet, plaintiff takes the liberty of referring to damages and profits from the sales of these other books, a matter outside the issues framed by the pleadings. For example, on pages 23-24 of their brief they refer, in the plural, to "sales of the books by defendant" and "defendant's infringing sales". Then, on page 29 they say: "The Court's finding is erroneous primarily because it ignores the profit made by defendant on the sale of the other infringing books." (underlining added.)

^{7/} The pages of Pltfs. Ex. 1 can be removed, but the other three books may have been in different types of bindings (2 Tr. 98). Plaintiff states, on Page 4 of its brief, that "each copy contained reproductions of... each of plaintiff's twelve songs (1 Tr. 116-117, 227)", but the citations do not support the statement.



This much should be clear: Paragraphs 9, 25, 41, 57, 73, 90, 106, 122, 138, 154, 170 and 186 of the complaint only charge infringement by the sale of one book, Pltfs. Ex. 1, on June 13, 1962 (Tr. 2-29). Defendant did not expressly or impliedly consent to a trial on the issue of infringement by the sale of any other book. Rather, defendant objected often to such evidence (2 Tr. 18, 19, 24, 27, 34, 35, 107). Plaintiff did not move to amend the pleadings under Rule 15(b) of the Rules of Civil Procedure and the Court tried the case as limited to the one sale on June 13, 1962 (2 Tr. 14, 21, 24, 131). The Court said, during argument at the end of the case (2 Tr. 131):

"THE COURT: All you have is one sale here.

All the other sales were admitted to counter the defendant's contention that they had no intent to violate the statute."

After the sale on June 13, 1962, plaintiff did not notify defendant that it had infringed. Perhaps plaintiff's agents were unsuccessfully trying to purchase another fake book from defendant. Regardless of the reason, plaintiff waited nine months, then still without notice, filed this suit demanding \$250 for each of 12 songs or \$3,000 (2 Tr. 119).

Plaintiff owned 55 copyrights (2 Tr. 14-16). They could have demanded \$13,750.

More important, since the book contained 1,000 songs, under plaintiff's theory, defendant's total liability was a quarter of



a million dollars (\$250,000.00).

On February 28, 1964, plaintiff took Mr. Bleeker's deposition. He produced unchallenged documentary evidence of the cost of Pltfs. Ex. 1 (Pltfs. Ex. 14). Since plaintiff knew that defendant sold Pltfs. Ex. 1 to their own agent for \$25, plus \$1 tax, they knew the amount of defendant's profit and that their damage was not substantial. Yet, they pushed for trial, continuing to demand \$3,000.

The District Court found (1 Tr. 230-231):

"22. ... on February 28, 1964, plaintiff took the deposition of Mr. Bleeker, who produced documentary evidence showing that the profit on the Book was \$19.10.

* * *

"24. The Court finds that, after February 28, 1964, plaintiff's prosecution of this case on the theory that defendant's profits were not provable with certainty was not in good faith and was without any reasonable belief in the merits thereof. Plaintiff knew or should have known that the argument lacked merit.

"25. Plaintiff attempted to offer evidence of damage by sales of 'fake' books to the public by others than defendant. The Court sustained objections to this evidence and plaintiff made no persuasive argument nor cited any authority for the admissibility thereof.

"26. The Court finds that the prosecution of



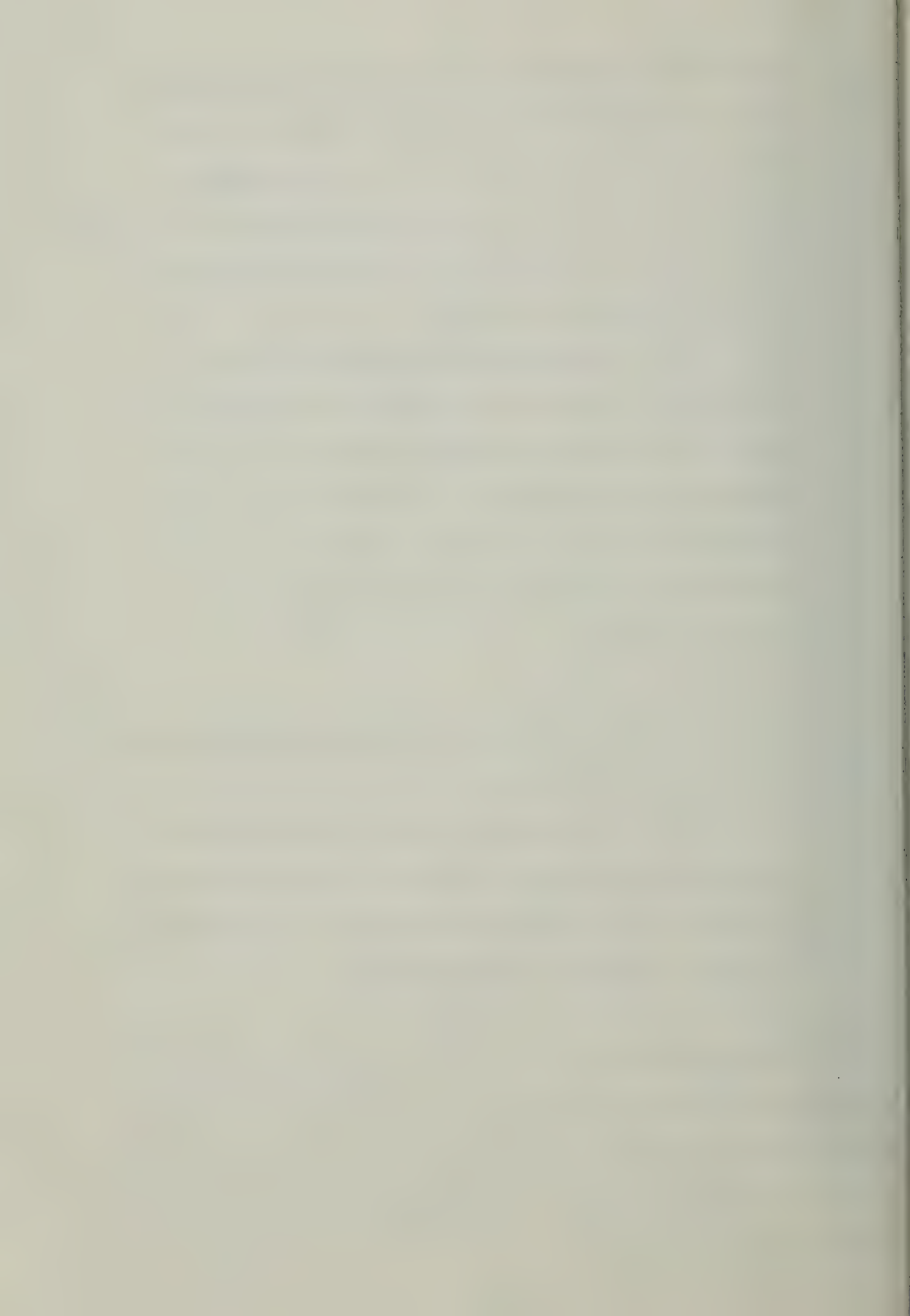
this action on the theory that plaintiff had been actually and 'substantially' damaged in an uncertain amount by the one sale to plaintiff's agent was not in good faith and was without any reasonable belief in the merits thereof. Plaintiff knew or should have known that the argument lacked merit.

"27. In view of Findings 24 and 26, the Court further finds that plaintiff's prosecution of this suit on the theory that statutory damages were mandatory was not in good faith and was without any reasonable belief in the merits thereof. Plaintiff knew or should have known that the argument lacked merit." (underlining added.)

Defendant made every effort to avoid this costly litigation. The Court found that (1 Tr. 230):

"21. On October 29, 1964, defendant offered a judgment in the amount of \$50.00, which was rejected by plaintiff. The case thereafter went to trial in November, 1964, on the issue of damages."

Since plaintiff was not entitled to this amount, defendant became the prevailing party under Local Rule 15(c). The Court exercised its discretion to award defendant its attorney fees as a part of costs under 17 U.S.C. 116 (Opinion, Appendix B). Said the Court (1 Tr. 231-232):



"29. The Court finds defendant's reasonable attorneys' fees to be \$1,500.00 for the period after October 29, 1964. This is based on:

"(a) The preparation for trial, including research and preparation of a Pre-Trial Memorandum;

"(b) Trial time;

"(c) Research and preparation of an extensive Post Trial Memorandum;

"(d) Research and preparation of a Reply to Plaintiff's Opening Brief After Trial;

"(e) The skill employed in the foregoing;

"(f) The amount of defendant's possible total liability based on plaintiff's theories, which could have amounted to \$250,000.00; and

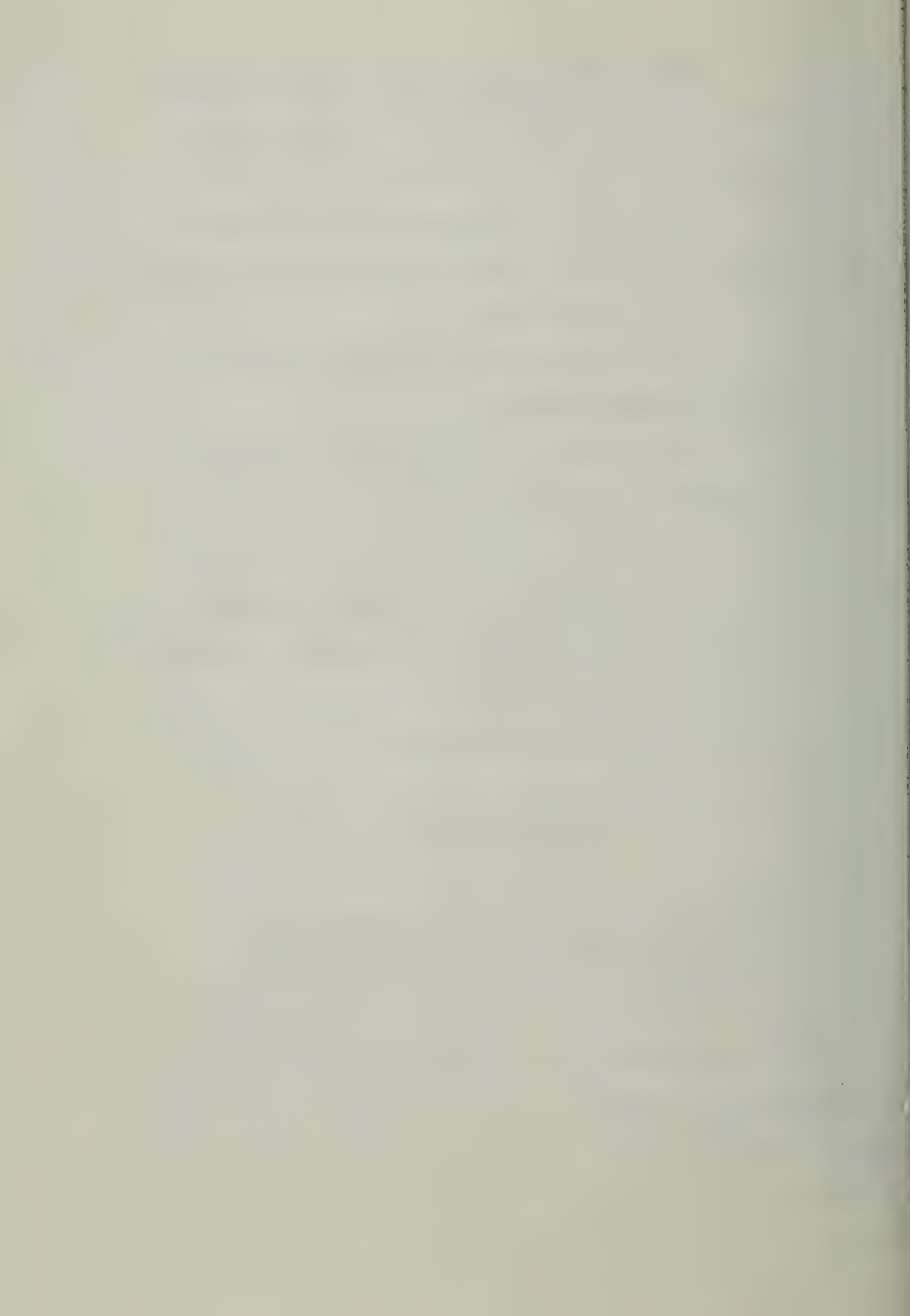
"(g) The result achieved."

ARGUMENT

I

THE AWARD OF STATUTORY DAMAGES IN LIEU OF ACTUAL DAMAGES AND PROFITS IS DISCRETIONARY WITH THE TRIAL COURT.

The law was clearly and repeatedly stated in Woolworth v. Contemporary Arts, 344 U.S. 228, 95 USPQ 396 (1952). There, the defendant Woolworth bought 127 dozen infringing cocker spaniel statuettes and distributed them through thirty-four Woolworth stores. Woolworth's profits of \$899.16 were sufficiently proved to



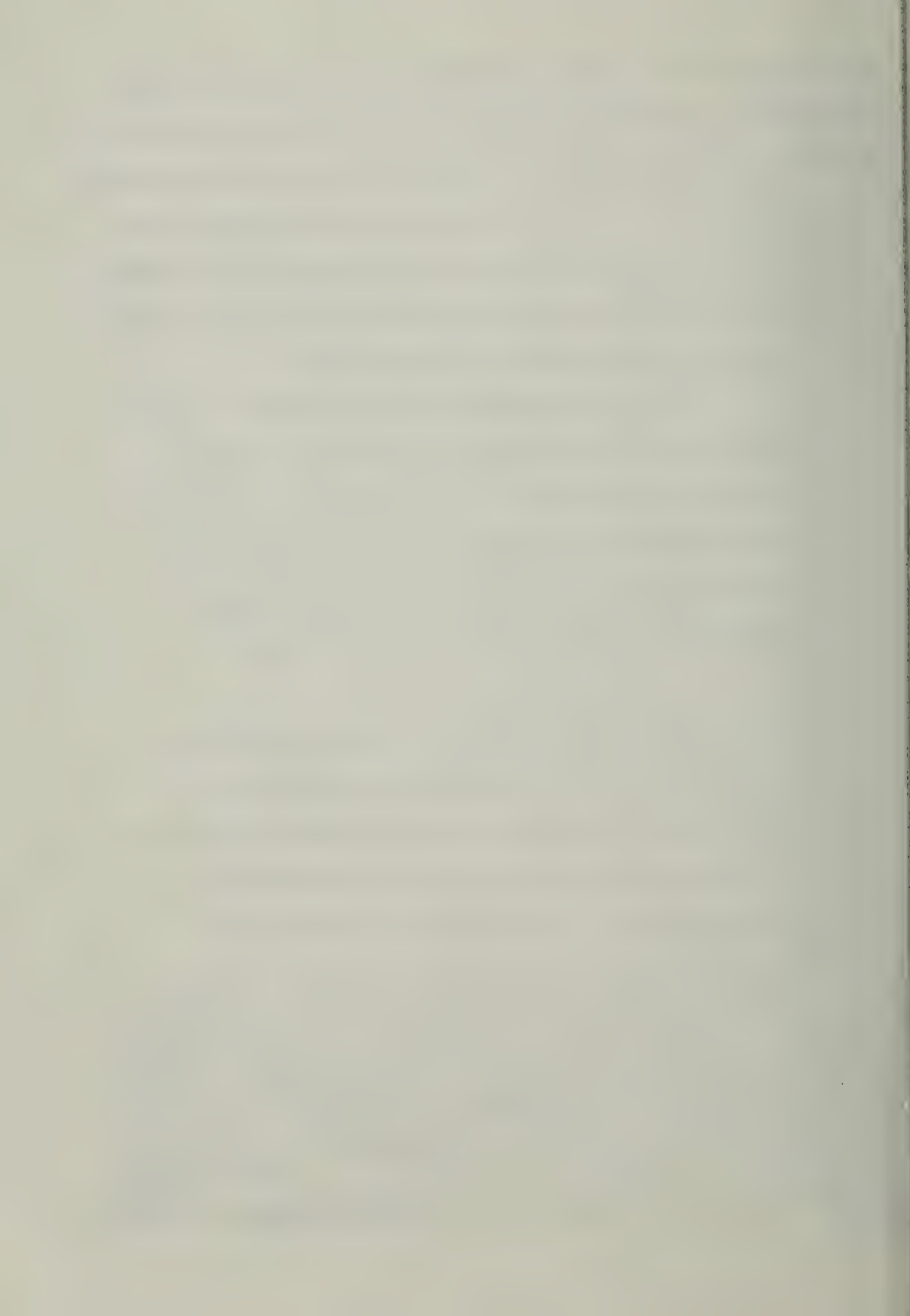
enable assessment of that element of liability. The record was inadequate to establish an actually sustained amount of damage to plaintiff but enough appeared to indicate that "real and substantial" injury was inflicted. ^{8/} The Court awarded the copyright owner \$5,000 as statutory damages in lieu of actual damages and profits. In affirming, the Supreme Court repeatedly emphasized that statutory damages were discretionary. Said the Court:

"... the statute has been interpreted to vest in the trial court broad discretion to determine whether it is more just to allow a recovery based on calculation of actual damages and profits, as found from evidence, or one based on a necessarily somewhat arbitrary estimate within the limits permitted by the Act.

* * *

"... It is plain that the court's choice between a computed measure of damage and that imputed by statute cannot be controlled by the infringer's admission of his profits which might be greatly exceeded by the damage inflicted. Indeed sales at a small margin

^{8/} Damages and profits are distinct items of recovery and are awarded upon quite different legal principles. Damages may include profits which the plaintiff would have made upon additional sales of its copyrighted book, had not the infringing book been competing in the market. Sammons v. Colonial Press, 126 F.2d 341, 53 USPQ 71, 74 (1st Cir. 1942). But damages do not include defendant's profits. Cf. Nimmer on Copyright, Sec. 150, p. 666. Both profits and damages may not be recovered. Howell's Copyright Law (Revised Edition) by Alan Latman, pp. 169-170; Nimmer on Copyright, Sec. 151, pp. 667-669; Universal Pictures v. Harold Lloyd, 162 F.2d 354, 73 USPQ 317, 334 (9th Cir. 1947).

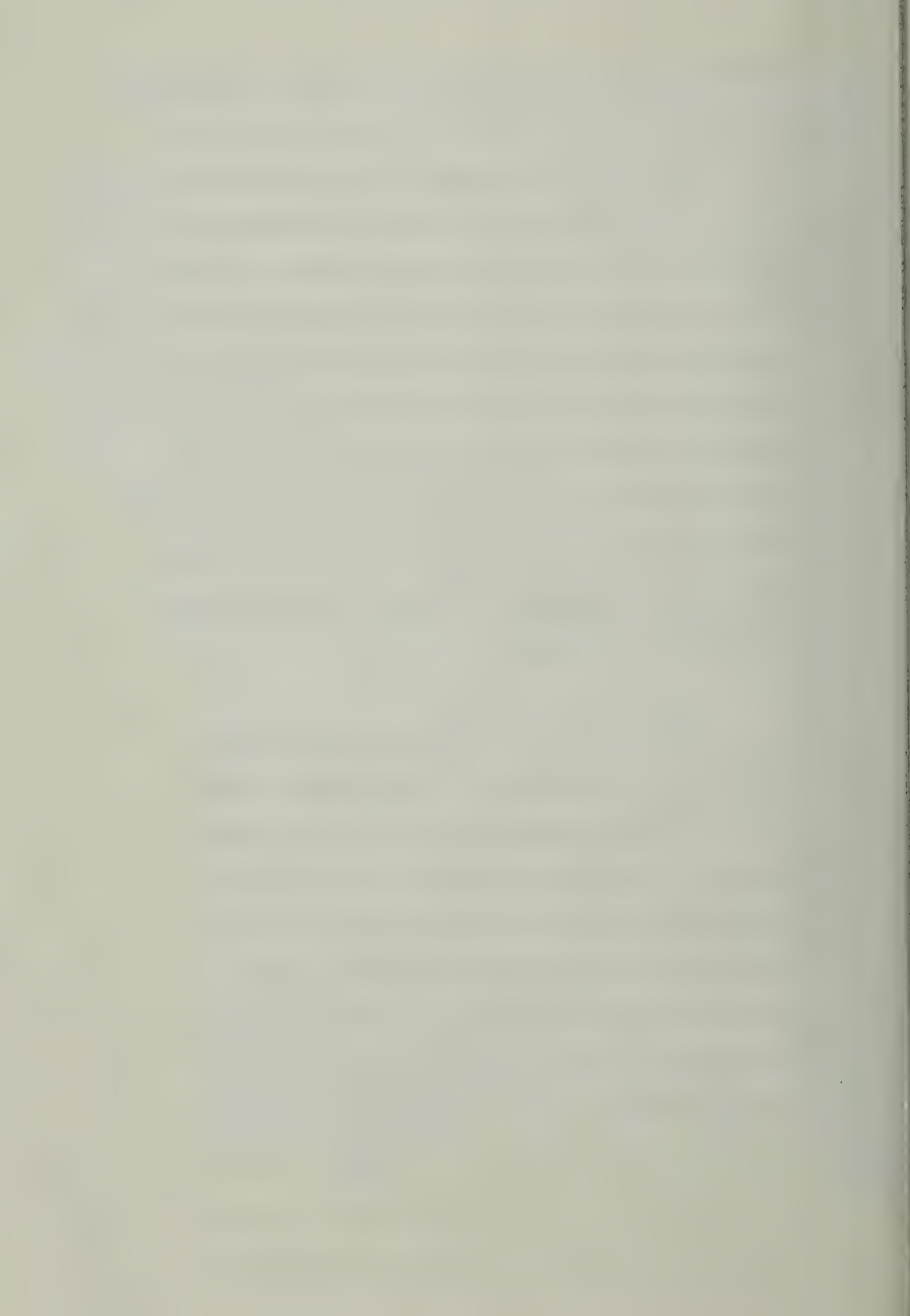


might cause more damage to the copyright proprietor than sales of the infringer article at a higher price.

"Whether discretionary resort to estimation of statutory damages is just should be determined by taking into account both components and the difficulties in the way of proof of either. In this case the profits realized were established by uncontradicted evidence, but the court was within the bounds of its discretion in concluding that the amount of damages suffered was not computable from the testimony. Lack of adequate proof on either element would warrant resort to the statute in the discretion of the court, subject always to the statutory limitations.

* * *

"Moreover, a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damage for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a



liability within statutory limits to sanction and vindicate the statutory policy."

* * *

"... Nor does anything in Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202 (9 USPQ 22), in the light of its facts, support petitioner. It holds use of the 'in lieu' clause permissible, 'there being no proof of actual damages,' but it does not hold that partial or unacceptable proof on that subject will preclude resort to the 'in lieu' clause.

"We think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon proven profits and damages or one estimated within the statutory limits is more just. We find no abuse of that discretion.

"The judgment below is affirmed."

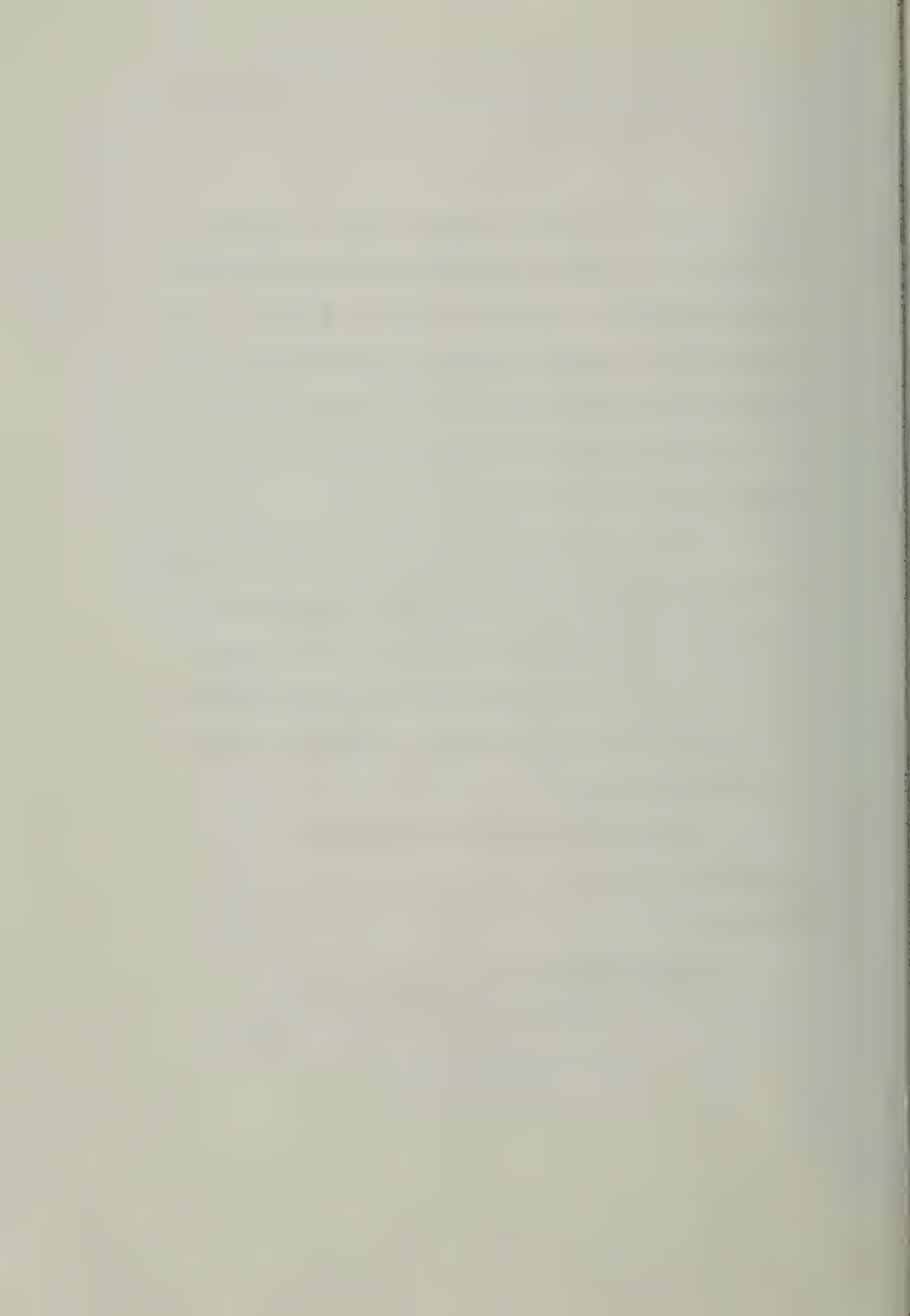
(emphasis added.)

Accord:

Universal Pictures v. Harold Lloyd,

162 F.2d 354, 73 USPQ 317, 336

(9th Cir. 1947).



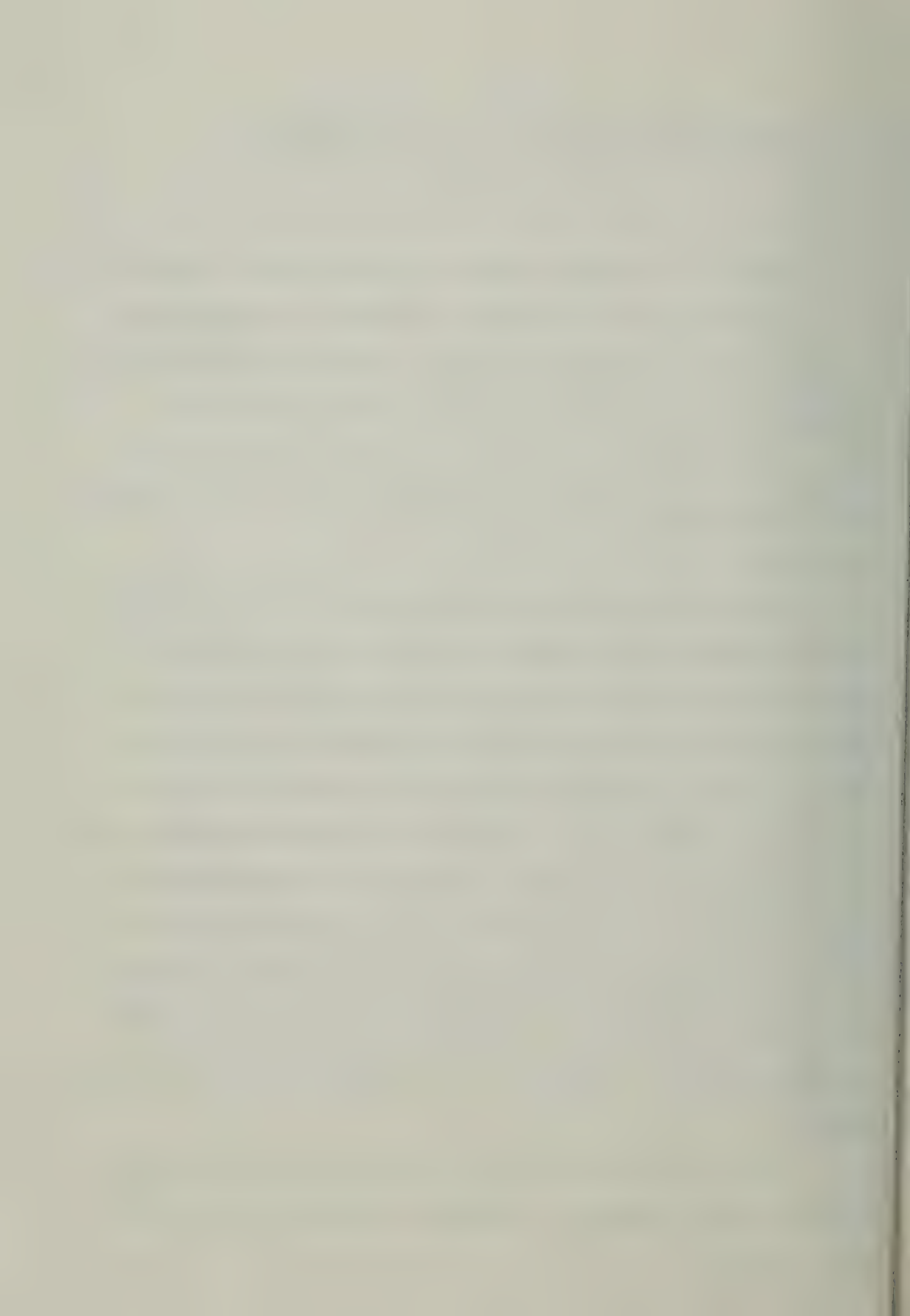
II

THE COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO AWARD STATUTORY DAMAGES.

The only issue here is whether Judge Hall abused his discretion in refusing to award statutory damages. The Woolworth case says that "all the facts" should be considered, especially the damages and profits and the difficulties in the way of proof of either. Also, the Woolworth case says that the court should consider the necessity of deterring the defendant from further infringing activity.

In this case, how was plaintiff damaged? Would plaintiff's own investigator have purchased \$600 worth of sheet music (1,000 copies at 60¢ per copy) if he had not purchased the \$25 book from defendant? If so, plaintiff could have called Mr. Tempesta as a witness. In fact, his purchase of the book prevented its sale to a member of the general public who may have later bought plaintiff's sheet music. So, the purchase, if anything, increased plaintiff's sales. Furthermore, plaintiff did not prove that it was selling any of the copyrighted songs in the Los Angeles area or anywhere else on June 13, 1962. Therefore, even if the book had been sold to a member of the general public, there was no proof of diverted sales.

Plaintiff relied wholly for proof of damages upon the oral testimony of Mr. Hoagland, its longtime employee. He testified (2 Tr. 18):



"Q. As to the particular book before you, Plaintiff's Exhibit 1, do you know what has been the effect upon the plaintiff of the sale of that book?

"A. On the specific book, no."

Later, the contradicted himself (2 Tr. 34-35):

"THE COURT: Is there any damage to the plaintiff from the sale of this particular book?

"THE WITNESS: Yes, your Honor.

"THE COURT: All right."

Plaintiff cites Hoagland's conclusions and opinions as though the Court believed him. But the Court was concerned about the lack of available corroborating documentary evidence (2 Tr. 37-38):

"THE COURT: All right. Now, do you keep a record of the sales of each of these copyrighted songs? You have to in order to be, or do you still pay a royalty on each of these songs here?

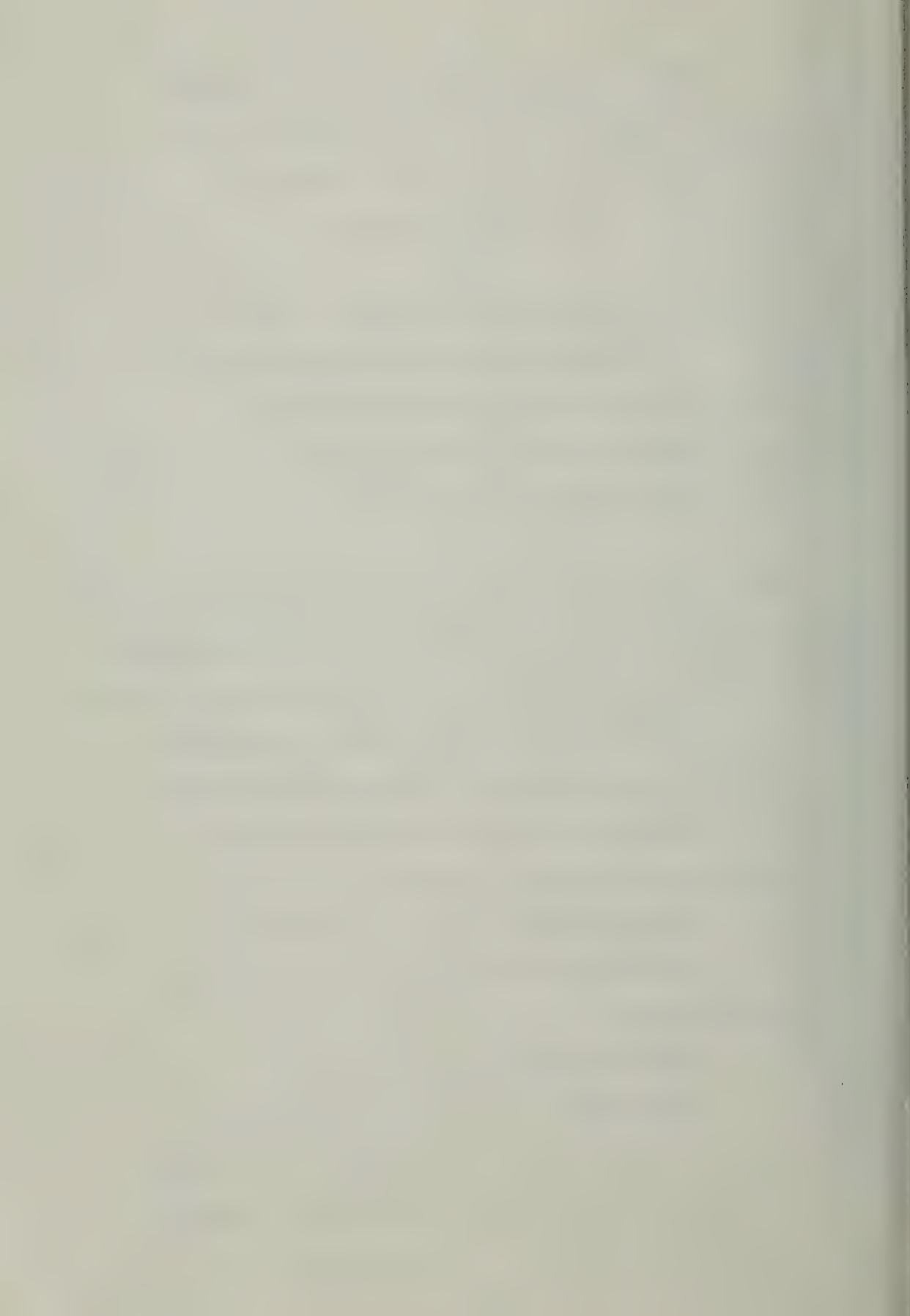
"THE WITNESS: Yes, sir, your Honor.

"THE COURT: So you keep a record of each of these sales?

"THE WITNESS: Yes, your Honor.

"THE COURT: Can you tell us how many copies of 'Lights Out' were sold within one year prior to June the 13th, 1962 and in the city of Los Angeles?

"THE WITNESS: No, your Honor.



"THE COURT: Can you tell me that as to any other one of these songs that are listed here?

"THE WITNESS: At the present time, no, your Honor.

"THE COURT: All right. Can you tell me how many sales you have made of those copies since June 13, 1962 up to this date?

"THE WITNESS: Total for the country, your Honor, or Los Angeles?

"THE COURT: No, no, Los Angeles.

"THE WITNESS: No, your Honor.

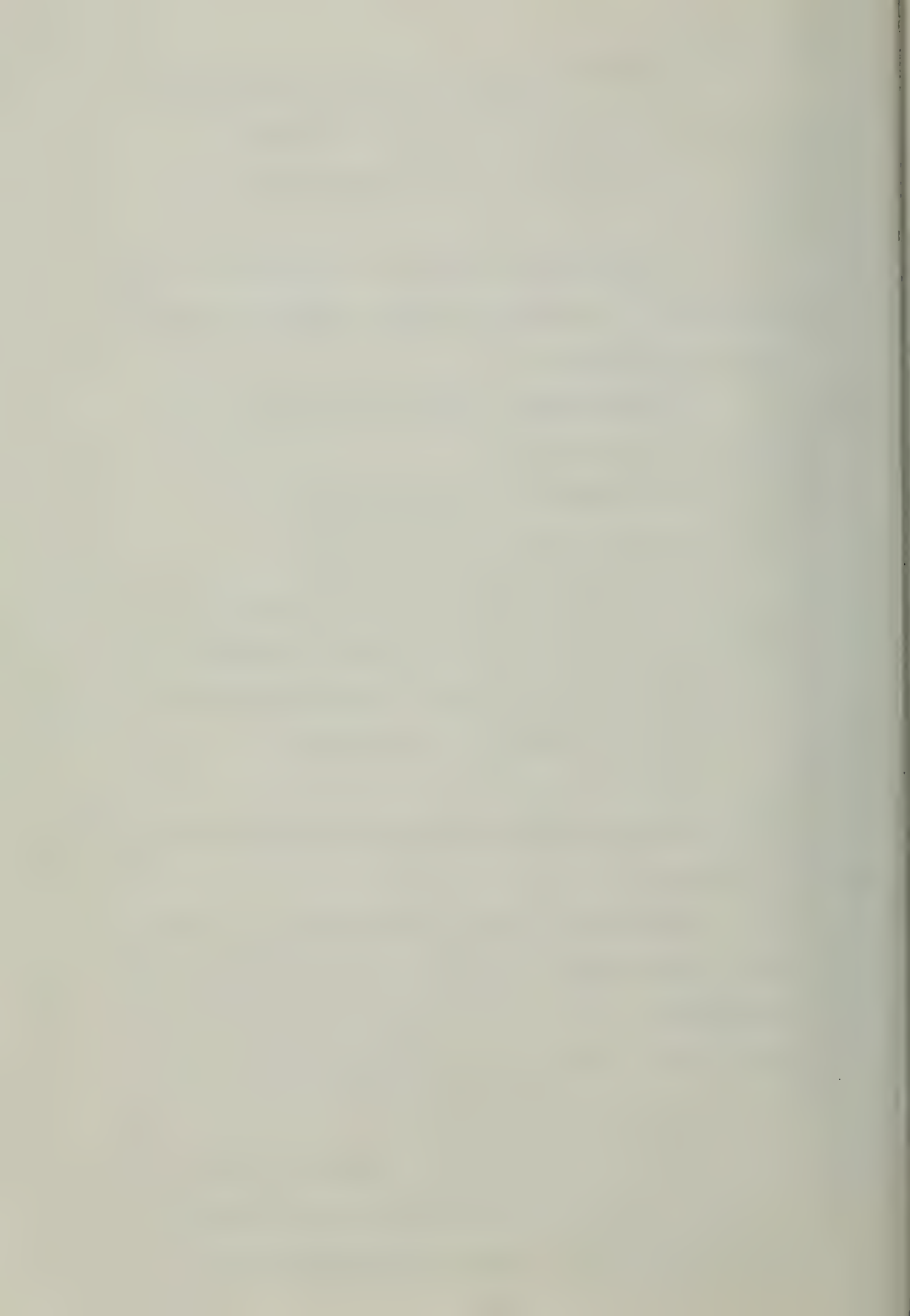
"THE COURT: So you have no comparison, although you have the facts and figures, the record in your office. You do not have that available here?

"THE WITNESS: No, your Honor."

Then, during argument at the end of the trial the Court said (2 Tr. 129-130):

"THE COURT: Well, what struck me, counsel, in the evidence in the case is the fact that the plaintiff did not attempt in this case to find out how many sales they had lost in the Los Angeles area where the defendant music stores are located.

"I asked the witness, the employee of the plaintiff, if he had any record of the sales of these copyrighted articles in the Los Angeles area, and



he said that his office did for the year before; and if he had them since, he said, yes, they had them. But they made no effort to produce them, and it seems to me that would really mean a measure of damages to the plaintiffs here."

Defendant is entitled to the benefit of all reasonable inferences and to have the evidence viewed most favorably to it. Stacher v. United States, 258 F.2d 112 (9th Cir. 1958). The trial court may reject entirely the uncontradicted testimony of a witness, particularly if such witness was an interested party. Joseph v. Donover, 216 F.2d 812 (9th Cir. 1958). Furthermore, the burden on an appellant, who seeks to reverse a judgment for error in fact, to show that essential findings are clearly erroneous is, indeed a heavy one when, ... [the] decision must turn largely upon the credibility of witnesses the trial judge saw and heard. Hedger v. Reynolds, 216 F.2d 202 (2nd Cir. 1954).

Applying these legal principles, the Court did not err in finding that there was "no evidence of any damage to plaintiff" (1 Tr. 230).

On the issue of profits, the unquestioned documentary evidence showed that defendant paid \$5.90 for the book and sold it for \$25.00, a profit of \$19.10. Plaintiff claims that profit was uncertain because the amount of overhead allocable to the sale is uncertain. But 17 U.S.C. Sec. 101(b) says:

" . . . in proving profits the plaintiff shall be

- required to prove sales only, and the defendant shall
- be required to prove every element of cost which he claims."

Plaintiff proved the sale. Defendant proved one element of cost, the purchase price of \$5.90. Defendant did not claim any overhead or other element of cost. It admitted a profit of \$19.10. Why does plaintiff complain? It did not have the burden of proving every element of cost and defendant's failure to prove additional costs makes plaintiff's recovery even larger than otherwise. Furthermore, plaintiff cannot dictate an accounting system to defendant. Nor can plaintiff dictate how defendant shall defend its case.

Defendant's profit covered over 1,000 songs. Plaintiff only sought recovery on twelve. It did not prove that these twelve were any more or less valuable than the others. So, the Court apportioned the profit by taking $12/1000$ of \$19.10, which amounted to 23 cents. Certainly, plaintiff should not recover defendant's profits on the copyrighted songs of other members of the Music Publisher's Protective Association. This was not a class suit.

The Court did not err in finding that "the actual profits are trivial but are not difficult to ascertain" (1 Tr. 229).

This was a case in which plaintiff suffered no damage and defendant's profits from the infringement were 23¢. How can this Court say that the District Court abused its discretion in

refusing to award plaintiff \$3,000, especially where defendant innocently infringed by selling only one book and there was no evidence that he needed to be deterred from further infringements?

As the Court said in Universal Pictures v. Harold Lloyd, 162 F.2d 354, 73 USPQ 317, 336 (9th Cir. 1947):

"Award of statutory damages in the terms of the statute is proper only in the absence of proof of actual damages and profits. The Court having found the extent of both, the point fails."

III

WHERE PLAINTIFF FAILS TO PROVE REAL
AND SUBSTANTIAL DAMAGE AND DEFENDANT
PROVES PROFITS WITH CERTAINTY, AN
AWARD OF STATUTORY DAMAGES IS AN
ABUSE OF DISCRETION.

In Davilla v. Brunswick Balke Collender Co., 19 F. Supp. 819, 35 USPQ 157 (S.D. N. Y.) modified 94 F.2d 567, 36 USPQ 398 (2nd Cir. 1938), cert. denied 304 U.S. 572, 37 USPQ 844 (1938), there was "no proof of actual damages suffered by the plaintiff". The District Court awarded \$5,000.00 as "a statutory award of damages in lieu of actual damages and profits". In modifying the award the Circuit Court said:

" . . . we think there was ample evidence to make an award of damages on the basis of actual profits and, therefore, the master and the court below were in error in granting statutory damages. . . . actual

profits were sufficiently established before the master so as to preclude the recovery of statutory damages.

" . . . Since the amount of the sales was sufficiently proved, there was no basis for an award of statutory damages. Such an award should not be based upon the idea of punishment, but depends upon the absence of proof of actual profits and damages.

Dahnken v. Crowley, 252 Fed. 749, 754; Wester-
mann v. Dispatch Co., 249 U. S. 100."

The First Circuit applied the same rule in Sammons v. Colonial Press, Inc., 126 F.2d 341, 53 USPQ 71 (1st Cir. 1942). There, the plaintiff offered "no evidence of actual damages from the infringement". The District Court awarded \$250.00 and costs "in lieu of actual damages and profits". In remanding for further evidence on deductible expenses, the Court said:

" . . . if the district court finds after further hearing upon remand that Colonial Press made profits for which it must account, the amount of such profits will be the measure of recovery, and it will no longer be permissible to decree statutory damages 'in lieu of actual damages and profits.' Sheldon v. Metro-Goldwyn Pictures Corp., 309 U. S. 390, 399 (44 U. S. P. Q. 607, 610) (1940); Davilla v. Brunswick-Balke Collender Co. of New York, 94 F.2d 567, 569 (36 U. S. P. Q. 398, 399, 400) (C. C. A. 2d 1938).



Cf. Johns & Johns Printing Co. v. Paull-Pioneer Music Corp. 102 F.2d 282 (41 U.S.P.Q. 3) (C.C.A. 8th, 1939)."

The Court of Appeals for the District of Columbia applied the rule in The Washington Publishing Co. v. Pearson, 140 F.2d 465, 60 USPQ 224, 225 (D.C. Cir. 1944). There, the plaintiff "suffered no damages". The District Court awarded apportioned profits on the infringing book which amounted to \$15.46 against defendants Pearson and Allen. In affirming, the Court of Appeals said:

"Since the 'in lieu' clause is not intended as a penalty, the Court was right in awarding no damages. That clause 'was adopted . . . to give the owner of a copy-right some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.' It is not applicable here, first because there was no 'injury done' to appellant and second because 'the profits have been proved. . .'. Appellant cannot complain of the fact that the apportionment of profits between infringing and non-infringing parts of the book, though liberal to him, is not mathematically exact. The fact that the printer made no profit but took a loss is not, as appellant suggests, a reason for awarding statutory damages against the printer

'in lieu of' the profits which he did not make and the damages which appellant did not suffer. Certainly that profits and damages are nil is not equivalent to difficulty in proving them. "

Judge Yankwich applied the rule in Malsed v. Marshall Field & Company, 96 F. Supp. 372, 88 USPQ 552 (W. D. Wash. 1951). He said:

" . . . the facts in the case show not difficulty in ascertaining damages, but actual absence of any damages, not failure to prove damages, but non-accrual of damages, because of the failure of the plaintiff to exploit her copyright in a manner that would be harmed by competition and unauthorized use of her label by the defendant.

"Under Section 101, Title 17, U.S.C., damages and profits 'are distinct items of recovery and are awarded on quite different legal principles.' See, Sammons v. Colonial Press, 1942, C.A. 1, 126 F.2d 341, 344.

"The 'in lieu' provision is, as the language of the section states specifically, 'in lieu of actual damages and profits.' It does not apply where either actual damages or profits are ascertainable. This has been the ruling of the courts ever since the section was amended to its present form. The following

quotations are typical:

" 'The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect, the old law was unsatisfactory.' *Douglas v. Cunningham*, 1935, 294 U.S. 207, 209. (Emphasis added)

" 'The plaintiff seems to suppose that regardless of any loss, it may satisfy its spleen by treating the allowances as penalties; but the section expressly declares that they are not to be regarded as such. They are "in lieu of actual damages and profits," and are limited to "such damages as to the court shall appear to be just," though it is true that the court may use them without proof of the quantum of the loss. The minimum was all that was proper, when we can see, as we can, that the plaintiff has not been damaged.' *Russell & Stoll Co. v. Oceanic Electrical Supply Co., Inc.*, 1936, C.A. 2, 80 F.2d 864, 865 [28 USPQ 203, 204].

* * *

"The plaintiff takes the view that, because the recovery of both profits and damages are allowable, the 'in lieu' provision is effective in case one or the other element of recovery is difficult of ascertainment. The weakness of this argument is that it overlooks the very wording of the section which is to the effect that in order that the 'in lieu' provision be resorted to, there must be difficulty or impossibility of computing both damages and profits. Or, differently put, if profits are ascertainable, the minimum provided in the 'in lieu' provision need not be resorted to. The Supreme Court in *Sheldon v. Metro-Goldwyn Corp.*, 1940, 309 U.S. 390, 399, has said so specifically:

" 'We agree with petitioners that the "in lieu" clause is not applicable here, as the profits have been proved and the only question is as to their apportionment.' " (emphasis added)

"In the present case, the exact number of labels used after the expiration of the license has been stipulated to. So has the price which was added to each candy box when the label was used. And the profit, whether computed on the basis of the actual amount earned per box or, - as computed by the defendant's expert accountant on the basis of cost accounting and of the revenues and profits of the department in which the candy was sold in relation

to the profits of the entire store, - has been shown with as much precision as is possible. It amounts, at most, to one hundred dollars. And when we give the plaintiff the benefit of all this profit, we are giving her all that she is entitled to, - all the detriment she has suffered by the infringement. Theoretically, in a proper case, both damages and profits are recoverable. But when the plaintiff has suffered no damages, and the profits are ascertainable, to resort to the 'in lieu' clause and award to the plaintiff a minimum based upon her theory of three publications, - the printing of the five hundred labels and the two advertisements - would amount to the imposition of a penalty. And the 'in lieu' provision has been declared by the cases not to be such, but rather, the equitable substitute for cases which present difficulty or impossibility of proof as to damages and profits. (Douglas v. Cunningham, supra, p. 209-210). Where no such difficulty exists, where, on the contrary, exact proof of profits has been made, and no other damage is shown to have flown from the violation, there is no need for resorting to the 'in lieu' provision."

IV

AN AWARD OF STATUTORY DAMAGES AS PUNISHMENT IS NOT WITHIN THE COURT'S DISCRETION.

In Turner & Dahnken v. Crowley, 252 Fed. 749 (9th Cir. 1918), the District Court awarded statutory damages of \$1.00 for each of 7,000 copies of the words and music of "My California Rose" copied, published and distributed by defendant, although the Court found that plaintiff's profit would not have exceeded 8¢ per copy or \$560.00. In reducing the award from \$7,000.00 to \$560.00, this Circuit said:

" . . . the duty of the court was to award damages as justified by the nature and circumstances of the case as developed upon the trial. Thus, while the discretion of the court may be used to award damages where no proof of actual damage is offered, yet the award should have relation to such inferences as are reasonably deducible from the whole case of infringement, and such damages are not to be awarded as based upon the idea of punishment." (emphasis added).

If \$7,000.00/\$560.00 or 12-1/2 times profits is a penalty ^{9/} where 7,000 copies are distributed to the public, certainly

^{9/} Where the sum sought to be exacted is excessive, that is, greatly disproportionate to the actual loss, a penalty rather than damages will be inferred. Helwig v. United States, 188 U.S. 605 (1903).

\$3,000.00/25¢ or 12,000 times profits is a penalty where there is only one sale to plaintiff's own investigator.

V

DEFENDANT'S INNOCENT INTENT MAY PRECLUDE AN AWARD OF STATUTORY DAMAGES.

Nimmer on Copyright, Sec. 148, p. 660 says:

"But if innocent intent does not generally derogate from liability, it may have a considerable bearing on the remedies available to the complaining party . . . courts have . . . suggested that innocent intent may be a defense to an award of damages. . . ."

VI

THE COURT DID NOT ABUSE ITS DISCRETION IN REFUSING AN INJUNCTION AND AWARDING DEFENDANT ATTORNEYS' FEES.

The right to an injunction is not absolute. Injunctive relief ordinarily will not be granted when there is no probability or threat of continuing or additional infringements. Massapequa v. The Observer, 126 USPQ 229 (E.D. N.Y. 1960); Sheldon v. Moredall, 95 F.2d 48, 37 USPQ 286 (2nd Cir. 1938). Defendant established the absence of such threat by Mr. Bleeker's testimony at trial. Unlike Hoagland's testimony, the Court believed it.

An award of attorneys' fees is discretionary. Buck v. Bilkie,

63 F.2d 447, 16 USPQ 382 (9th Cir. 1933). There is no statutory limitation to "exceptional cases" as in patent law. Plaintiff's refusal to accept the Supreme Court decision in the Woolworth case is sufficient grounds alone for awarding attorneys' fees. Rose v. Bourne, 176 F. Supp. 605, 123 USPQ 29 (S. D. N. Y. 1959).

The award does not have to rest on the finding of bad faith or economic disparity. Plaintiff's claim need only be "unreasonable". In other words, defendant may be awarded attorneys' fees if plaintiff employed "a highly technical argument as a means of extracting a grossly unfair penalty assessment from the defendants". Mailer v. RKO, 332 F.2d 747, 141 USPQ 462 (2nd Cir. 1964). Since that is what happened in this case, the District Court did not abuse its discretion in finding that plaintiff's claim for mandatory damages was unreasonable. 10/

VII

PLAINTIFF'S AUTHORITIES SUPPORT DEFEND- ANT.

There is not enough space to analyze the more than 50 cases cited by plaintiff, most of which were lower court cases prior to the Woolworth decision. Therefore, defendant will only discuss the Supreme Court cases relied on by plaintiff.

10/ The Court only awarded attorneys' fees for the period after October 29, 1964 (2 Tr. 231), thereby limiting the award to the amount expended in defending against plaintiff's claims for damages and excluding the amount incurred in defending on the infringement issue.

In reading the cases, it is important to keep in mind that while the Court has discretion in awarding statutory damages, once it has affirmatively exercised that discretion, it is mandatory that the Court award the statutory minimum. So, if the Court exercises its discretion, without saying so, and then talks about the minimum being mandatory, plaintiff may erroneously cite that decision as holding that statutory damages are mandatory in every case.

In Westerman v. Dispatch, 249 U. S. 100 (1919), upon which plaintiff heavily relies, the defendant did not prove profits with certainty; "Whether the defendant made any profit from the publications . . . (did) not appear" (at page 104).

Plaintiff's damage was "real and substantial"; six copyrighted items were published in a daily newspaper having a circulation of 30,000 copies in an area where plaintiff had exclusively licensed the copyrighted works. The Court said (at page 103):

"The record, while showing that plaintiff was damaged by the infringing publications, does not show the amount of damages, a matter which is explained by undisputed testimony to the effect that the damages could not be estimated or stated 'in dollars and cents, or in money'." (emphasis added).

Also, the "plaintiff asked for what are termed statutory damages in lieu of actual damages and profits" (at page 104). And "both parties recognize(d) that under the proofs the damages must be assessed under the alternative provision requiring the infringer,

in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc." (at page 106). So there are at least five grounds for distinguishing Westermann:

(1) In that case, defendant did not prove profits with certainty; here defendant did.

(2) There, plaintiff's damages were "real and substantial"; here, they were not.

(3) In Westermann, plaintiff asked only for statutory damages; here, plaintiff asked for damages and profits, or, in the alternative, for statutory damages (2 Tr. 28-29).

(4) There, defendant agreed that statutory damages should be awarded; here, defendant took a vigorous contrary stand.

(5) In Westermann, the plaintiff's agent did not procure the infringement; here, he did. 11/

Westermann was a case in which the trial court clearly exercised its discretion to award statutory damages. Having done so, the Supreme Court held it could not award less than \$250.00. So, the ominous underlined words from Westermann on page 18 of Plaintiff's Brief, relate to a case in which the Court, with the consent of both parties, exercised its discretion to award statutory

11/ Cf. Nimmer on Copyright, Sec. 147, page 656:

"The defense of estoppel is clearly available if plaintiff has aided the defendant in the acts of alleged infringement or has induced or caused the defendant to perform such acts."

damages. The following bracketed, underlined words should therefore be inserted in the quote:

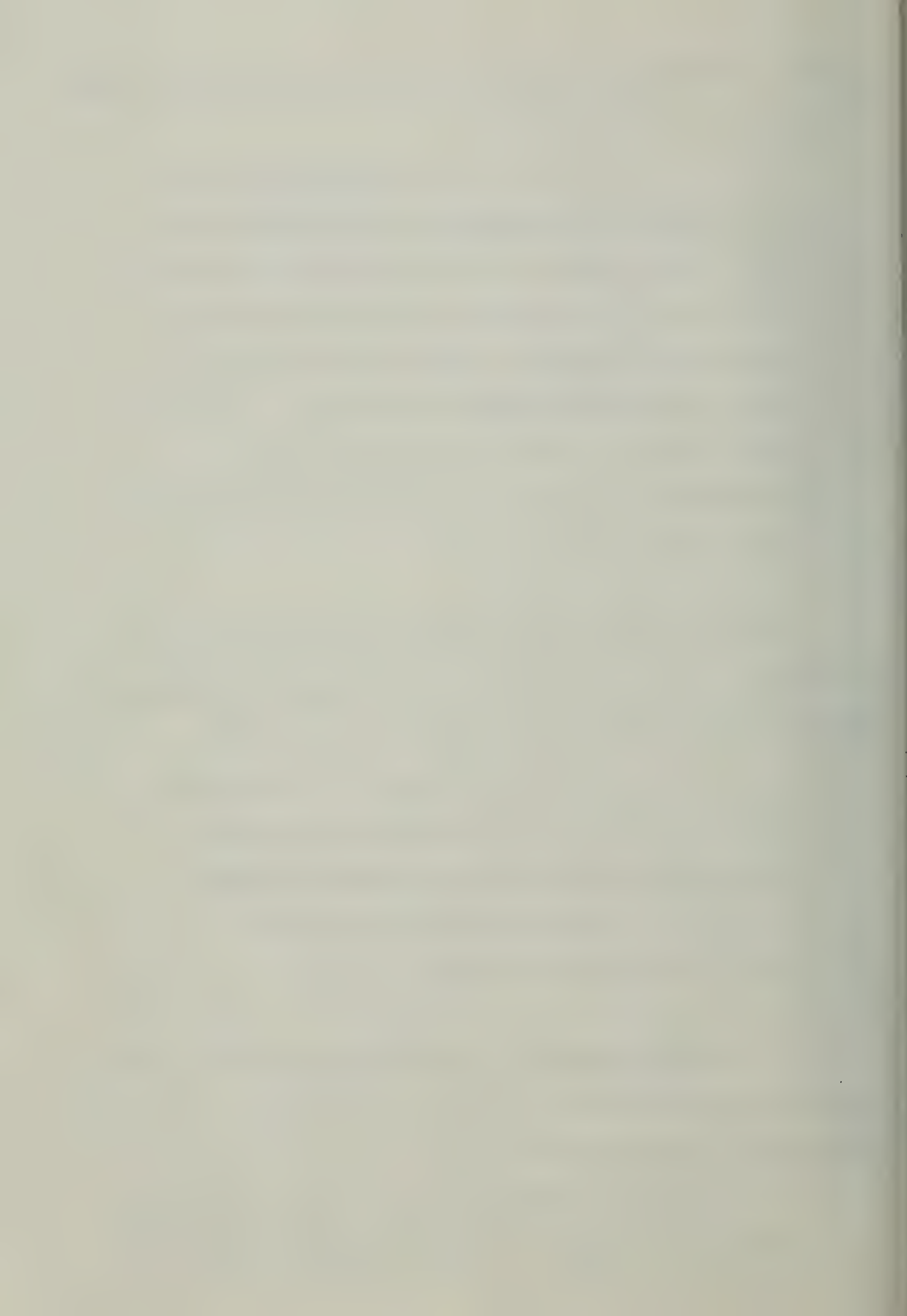
" . . . in every case (in which the court exercises its discretion to award statutory damages) the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them. " (Material in brackets and underlining added).

There is nothing in Westermann which says that \$250 is the minimum if the Court exercises its discretion not to award statutory damages. On the contrary, the Court said (at page 101):

" . . . when actual damages are proven which cannot be measured in dollars and cents, then the Court may, in the exercise of its sound discretion, award a sum within the maximum and minimum limits. " (underlining added).

As for Jewell-LaSalle v. Buck, 283 U.S. 202 (1931), this Court should accept the Supreme Court's own interpretation thereof. In Woolworth, the Supreme Court said:

"Nor does anything in Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202, in the light of its facts support

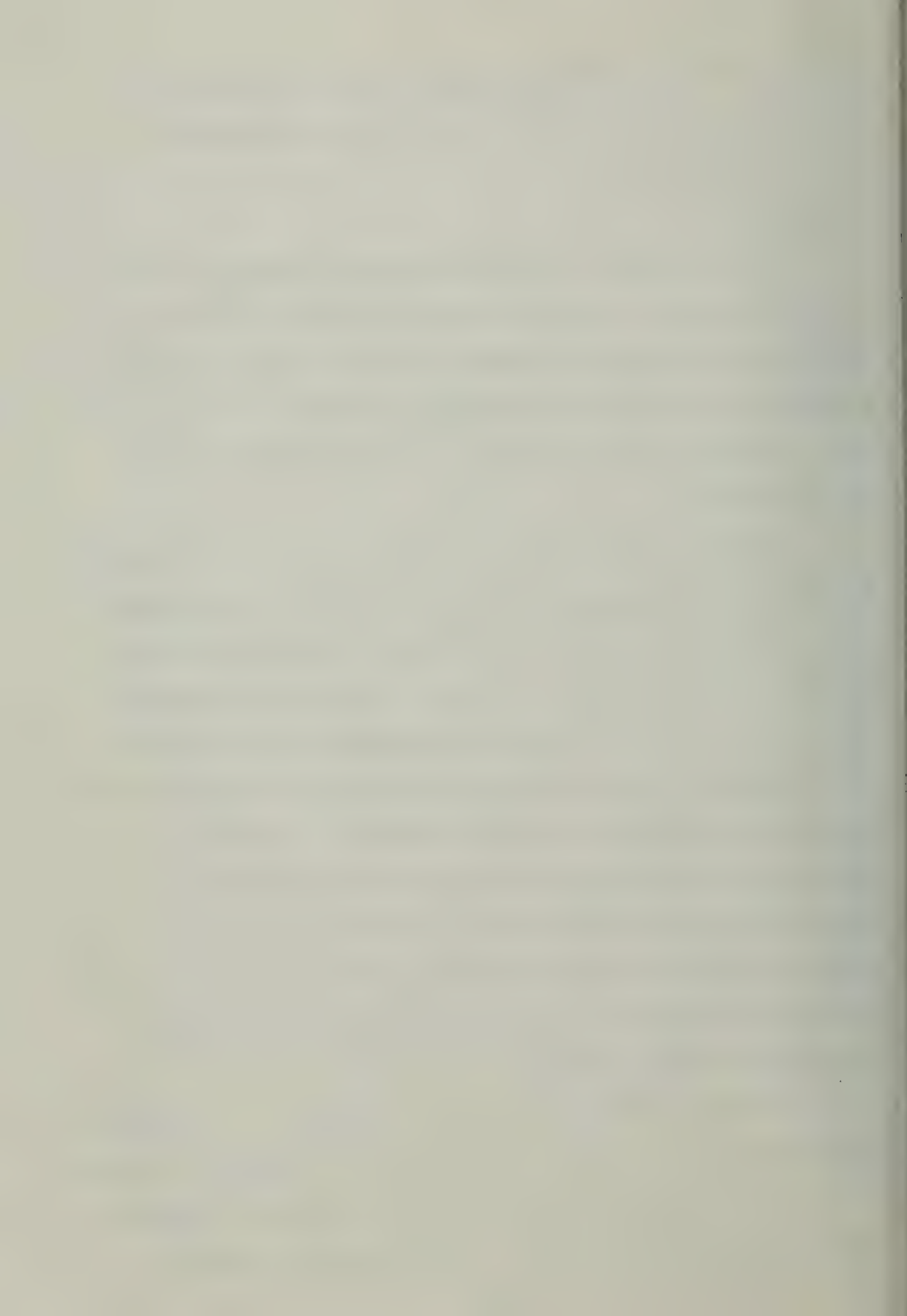


petitioner. It holds use of the 'in lieu' clause permissible, 'there being no proof of actual damages'." (emphasis added).

In this connection, plaintiff cites Buck v. Bilkie, 63 F.2d 447 (9th Cir. 1933), where there was no proof of actual damages and nothing appeared as to profits. The Court in Buck v. Bilkie plainly misinterpreted Jewell-LaSalle. They said it held the use of the "in lieu of" clause mandatory. The Supreme Court said "permissible".

The remaining Supreme Court case relied upon by plaintiff is Douglas v. Cunningham, 294 U.S. 207 (1935). There Douglas wrote an original story which was accepted, copyrighted and published by The American Mercury, Inc. Thereafter Cunningham appropriated the story for the Post Publishing Company and the latter published in some 384,000 copies of a Sunday edition. Douglas admitted inability to prove actual damages. The trial Judge ruled that no actual damages had been shown, but in lieu thereof granted the petitioners \$5,000 and a counsel fee. The Circuit Court of Appeals sustained an assignment of error which asserted the Judge had "abused his discretion" in making the award and reduced the damages to \$250.

The sole question presented was "whether . . . an Appellate Court may review the action of a trial Judge in assessing an amount in lieu of actual damages, where the amount awarded is within the limits imposed by the section". The Court held not, saying:

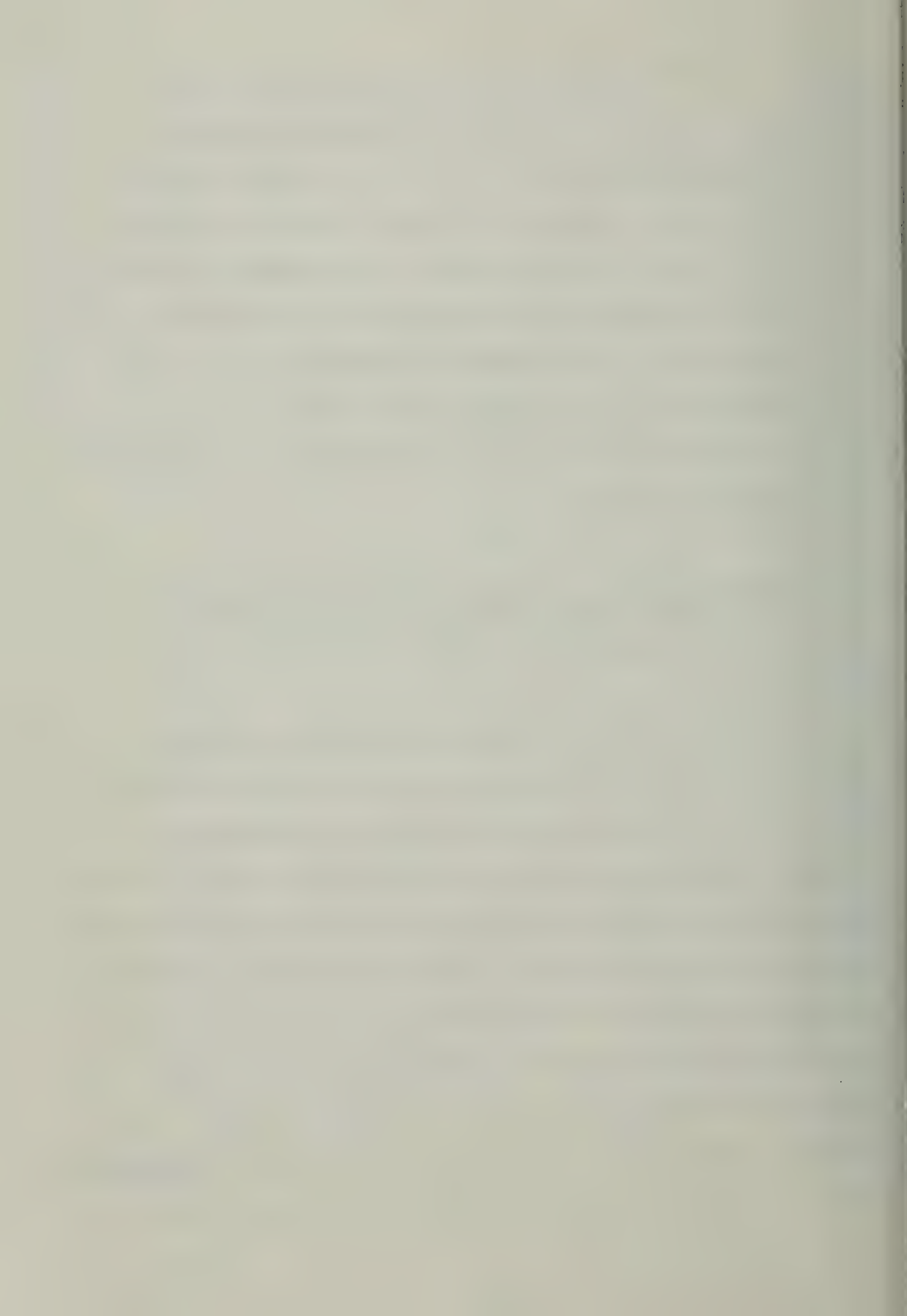


"This court has twice construed §25(b) in the light of its history and purpose. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100; Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202. As shown by those decisions, the purpose of the act is not doubtful. The trial judge may allow such damages as he deems to be just and may, in the case of an infringement such as is here shown, in his discretion, use [statutory damages within the prescribed limits] as the measure of damages." (underlining added).

VIII

REQUEST FOR ADDITIONAL ATTORNEY'S FEES TO COVER THE EXPENSES OF THIS BRIEF.

The attorney's fee awarded by the District Court only covered the expenses of defending the claim for damages in the District Court. After observing Mr. Bleeker's demeanor and hearing his testimony, the District Court found that he was a truthful and innocent infringer. But the District Court thought differently of plaintiff's witness Hoagland. Accordingly, the Court refused to exercise its discretion to award statutory damages. Under these circumstances, defendant submits that the prosecution of this appeal on the theory that statutory damages are mandatory -- in view of the Supreme Court cases just discussed, and the Woolworth decision -- is wholly without merit and a continuation of the



"unreasonable" attitude taken in the District Court.● Accordingly, defendant requests additional attorney's fees to cover the expenses of this Brief.

Respectfully submitted,

MAHONEY, HALBERT & HORNBAKER

By: ROBERT D. HORNBAKER

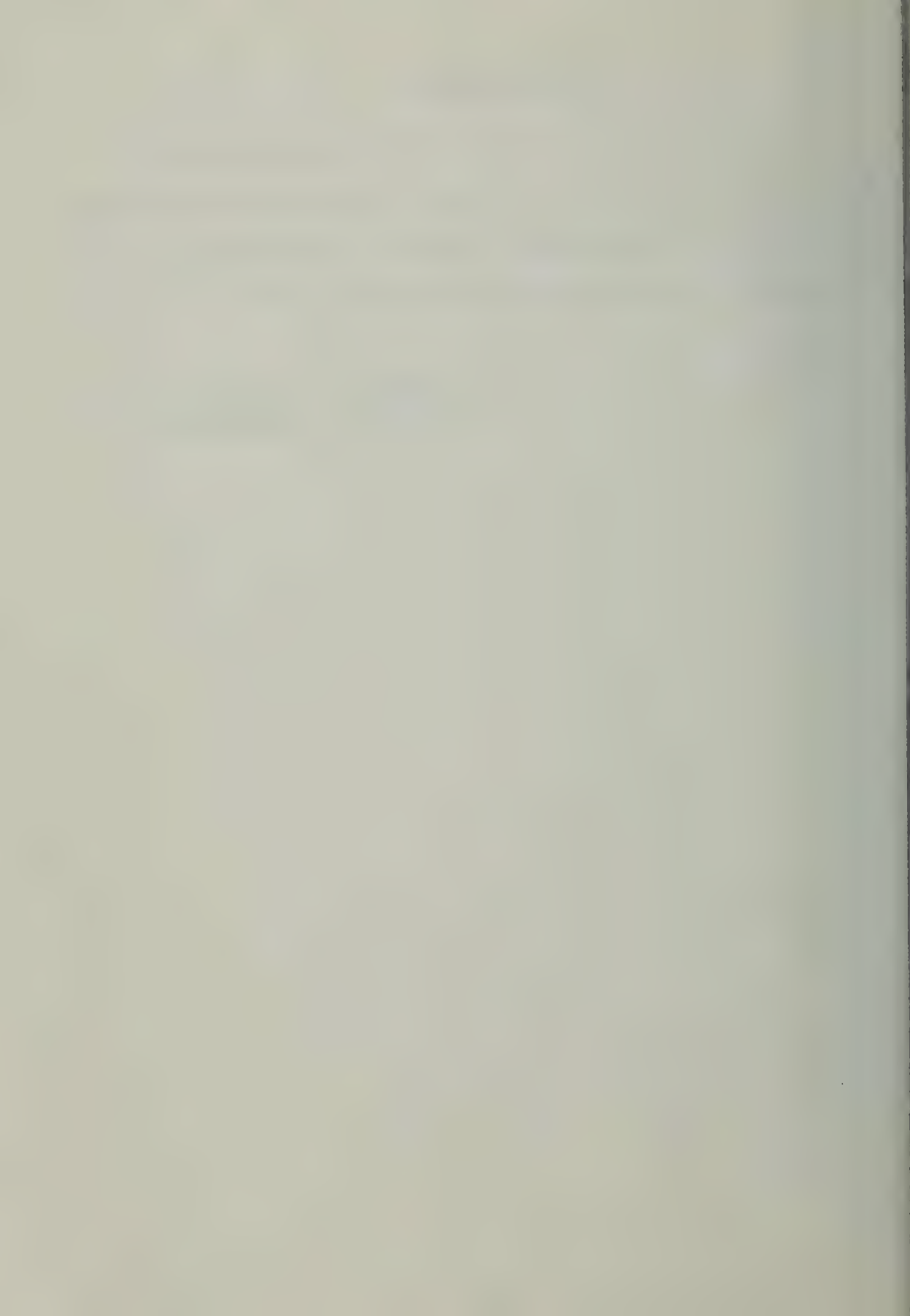
Attorneys for Appellee.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert D. Hornbaker
ROBERT D. HORNBAKER



APPENDIX A

MEMORANDUM DENYING MOTIONS FOR SUMMARY JUDGMENT - FILED DEC. 19, 1963 NO. 63-244-PH

This Complaint for infringement of copyright asserts that defendants, as Reed's Music Store, sold a "fake-book" which contained the right hand melody of 1,000 songs, 12 of which were copyrighted by the plaintiff.

Defendants filed a Motion for summary judgment on the ground that it does not appear that they "copied" the songs, and that the sale of the book constituted a "fair use." Plaintiff opposed the Motion for summary judgment and filed one of its own on the ground that plaintiff is entitled to the so-called "statutory minimum" damages of \$250 for each one of the plaintiff's 12 copyrighted songs contained in the single book.

Neither party is, in the opinion of the Court, entitled to summary judgment as each has misconceived the applicable law in certain respects.

Defendants have misconceived the applicable law in that the Copyright Act (17 U.S.C. 1) gives the person owning the copyright not only the exclusive right to copy, but also to vend the copyrighted work.

Plaintiff misconceives the applicable law in that it asserts that it is entitled to the minimum sum of \$250.00 for each of the songs, regardless of the actual damage suffered by the owners of the copyright and regardless of the profits which shall have been

made by the vendor.

The damage provision of the Copyright Act contained in 17 U.S.C. 101(b), in its pertinent part, provides as follows:

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable:

" * * *

(b) Damages and profits; amounts; other remedies--

To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages, the court may, in its discretion, allow the amounts as hereinafter stated, * * * * and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty. "

The book contained the melodies for 1,000 songs, and assuming that all of them were copyrighted, under defendants' theory, the plaintiff would be liable for damages in the sum of \$250,000 for the sale of a single book. Obviously this would be

an unjust result, and just as obvious, it seems to me, the result would be unjust for the plaintiff to recover \$3,000 in damages without proof of actual damage or of defendants' profits.

In Woodman v. Lydiard-Peterson Co. (Minn. 1912) 192 Fed. 67, at page 71, the Court said:

"The anomalous provision in this section is this: That the court may in lieu of actual damages and profits in its discretion allow such damages as shall appear to be just; yet it apparently requires such damages in this case to be \$250. But it cannot be possible that, where the court is of the opinion that there were no damages at all, it still is bound to allow \$250, and that, where the court is of the opinion that it would be a matter of injustice to allow even \$1, it would be compelled by law to allow \$250. Some other construction must be given to that provision. I think it means that where the court is satisfied that there are substantial damages, but the evidence is incomplete or is insufficient, so that the court cannot determine just what the damages are, then it may allow them on that basis. But wherever the court is of the opinion that the damages cannot be more than \$50 or \$100, it should not allow \$250."

In F. W. Woolworth Co. v. Contemporary Arts, Inc. (1952) 344 U.S. 228, the Court made clear that it is a matter of judicial discretion as to whether or not it is more just that recovery be

based upon proven profits of the defendant and damages to the plaintiff, or be within the statutory limits.

In this connection, it must be pointed out that the plaintiff is seeking relief in the alternative, i. e. , such damages as plaintiff has suffered as well as such profits as defendants have made, or in lieu thereof, not less than the \$250 minimum for each infringement.

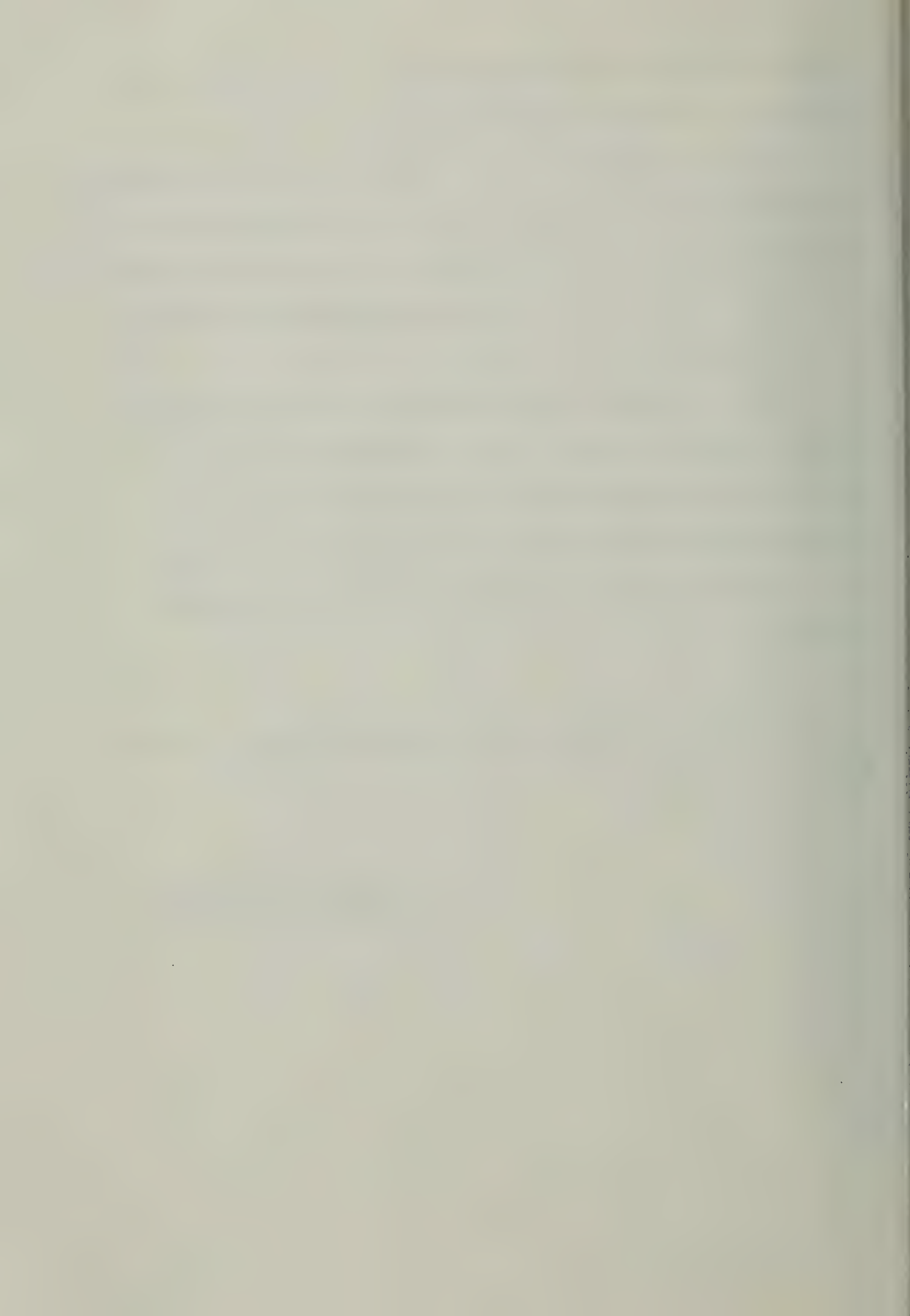
The parties should be put to their proof as to damages of plaintiff, and as to profits, if any, of defendants, before the Court is in a position to exercise the discretion which might result in the imposition of the statutory minimum of damages.

Accordingly, both Motions for summary judgment are denied.

DATED: Los Angeles, California, this 19 day of
December, 1963.

PEIRSON M. HALL

United States District Judge



APPENDIX B

MEMORANDUM - FILED JUNE 21, 1965
NO. 63-244-PH

After trial on the merits to the Court, the case was submitted for decision.

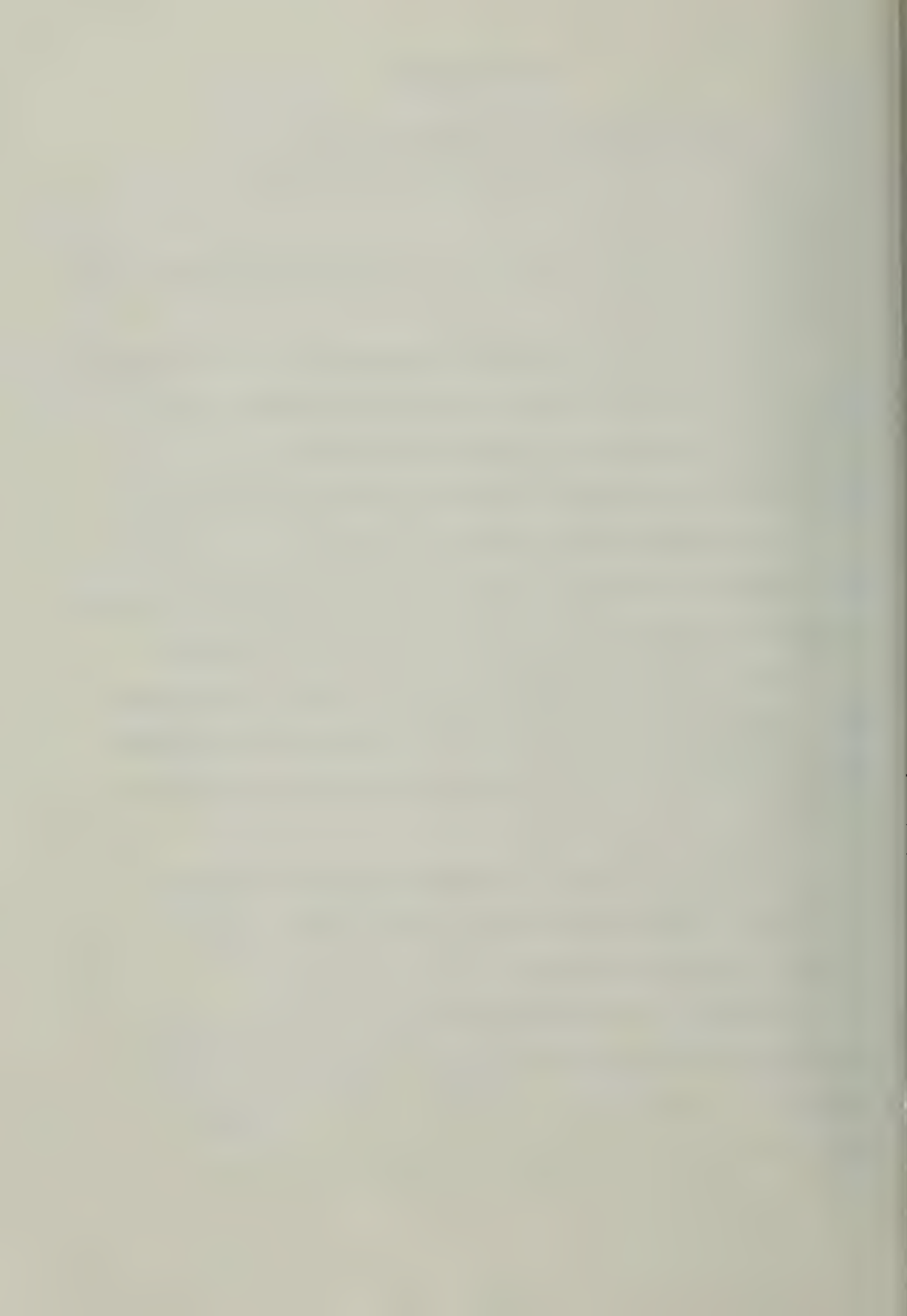
Plaintiff is the owner of 55 copyrighted musical compositions, the "right hand melody" of the title and chorus of each of which, and in some cases the entire lyrics and music, were printed in a book entitled "1,000 Favorite Standard Songs, Vol. 1."

Plaintiff did not authorize the reproduction in the book of any of the songs to which it owned the copyright, and no copyright notice was contained either in the book or any of the pages.

In the trade, the book is commonly called a "fake" book, which means that if a musician does not have the exact musical score before him, he plays the melody by memory and fakes the harmony.

Defendant is primarily engaged in the sale of musical instruments, but about one-half of one per cent of his total sales is from musical compositions.

On June 13, 1962, defendant sold one of said books to an agent of plaintiff for \$25.00 plus \$1.00 tax. This suit followed on March 1, 1963, seeking so-called "statutory" damages of \$250.00 for each of only 12 of the 55 copyrighted numbers



contained in the book sold to plaintiff's agent. 1/

The plaintiff, in addition to damages, seeks an injunction. But from the evidence in the case, the Court is not justified in concluding that there is any threat by the defendant to sell or continue to sell any of the copyrighted compositions, without plaintiff's permission, and the request for injunction will be denied, which leaves the matter of damages.

Defendant did not copy the material in the book but he did vend the book, and the exclusive right to vend resides in the plaintiff, the owner of the copyrights.

The plaintiff insists that it is entitled to the statutory damages for the 12 songs contained in the one book that was sold, or a total of \$3,000 for the one sale.

The "in lieu" provision for \$250.00 damages in the Copyright Act is not to be regarded as a penalty. As so well pointed out by Judge Yankwich of this Court in Malsed et al v. Marshall Field & Co. (W.D. Wash. 1951) 96 F.Supp. 372, the "in lieu" sections of the Copyright Act are there to permit a wronged plaintiff to recover where the rules of law render difficult or impossible proof of damages or discovery of profits. If either the profits or damages are ascertainable, the minimum provided

1/

The evidence shows that the defendant, over a period from August, 1961 to May, 1962, purchased a total of four copies of the book from one Mel Allen of Skoki, Illinois, the last two of which were purchased on May 31, 1962, at the price of \$5.90 each. The defendant still has one copy on hand which defendant's counsel has offered to be impounded. No credible evidence was introduced as to what became of the other two books.

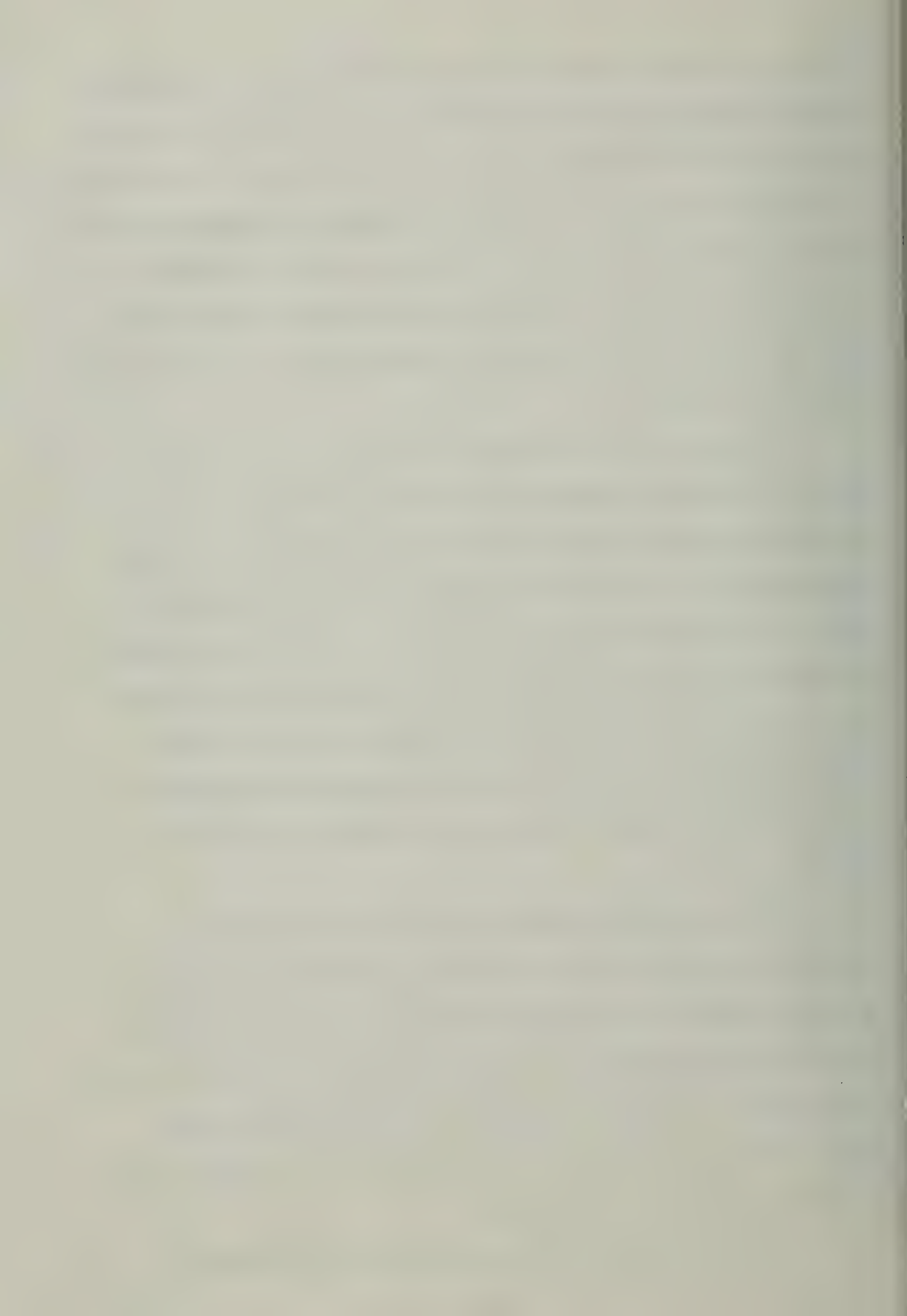


for in the "in lieu" provision need not be resorted to. [Sheldon v. Metro-Goldwyn Corp. (1940) 309 U.S. 390]. It has been said to be the equitable substitute for cases which presented impossibility of proof as to damages and profits. [Douglas v. Cunningham (1935) 294 U.S. 207]. Where no such difficulty exists, and where, on the contrary, exact proof of profit has been made and no other damages shown for the violation, there is no need to resort to the "in lieu" provision.

The justice and sensibility of the above rules of law become immediately apparent when it is considered that if the plaintiff were awarded \$250.00 each for the plaintiff's 55 copy-righted songs contained in the one book sold to the plaintiff's agent, the plaintiff would get its book back, i. e., its copyrighted compositions, plus \$13,750.00. Or to carry the matter further, if all of the 1,000 songs were copyrighted, the owners of the copyrights would be entitled to recover from this defendant who received a total of \$25.00, a total sum of \$250,000.00 for the one sale.

The actual profits made here are trivial but are not difficult to ascertain. The defendant paid \$5.90 for the book and sold it for \$25.00. His total profit for the entire book would be \$19.10, without deducting overhead. But since the book contained 1,000 songs, each song contributed .191 cents to the overall profit; hence, the defendant made a profit of 21 plus cents from the sale of the 12 infringed songs.

There is no evidence of any damage to the plaintiff.



Indeed, it is difficult to see how the plaintiff could be damaged by the sale because plaintiff's own agent bought the book, and thus prevented the circularization of the copyrighted material to the public.

I hold that whatever plaintiff is entitled to recover is de minimis. [Knapp-Monarch Co. v. Casco Products Corp. (7 Cir. 1965) 342 F.2d 622].

One other matter remains to be covered.

Defendant offered to stipulate a judgment in the sum of \$50.00. Plaintiff is not entitled to that amount, and under Local Rule 15(c), if a defendant offers a certain sum which is rejected by the plaintiff, and the case thereafter goes to trial with the resulting recovery of only the amount previously offered by the defendant, or less, then the defendant is the prevailing party, and as such, is entitled to costs.

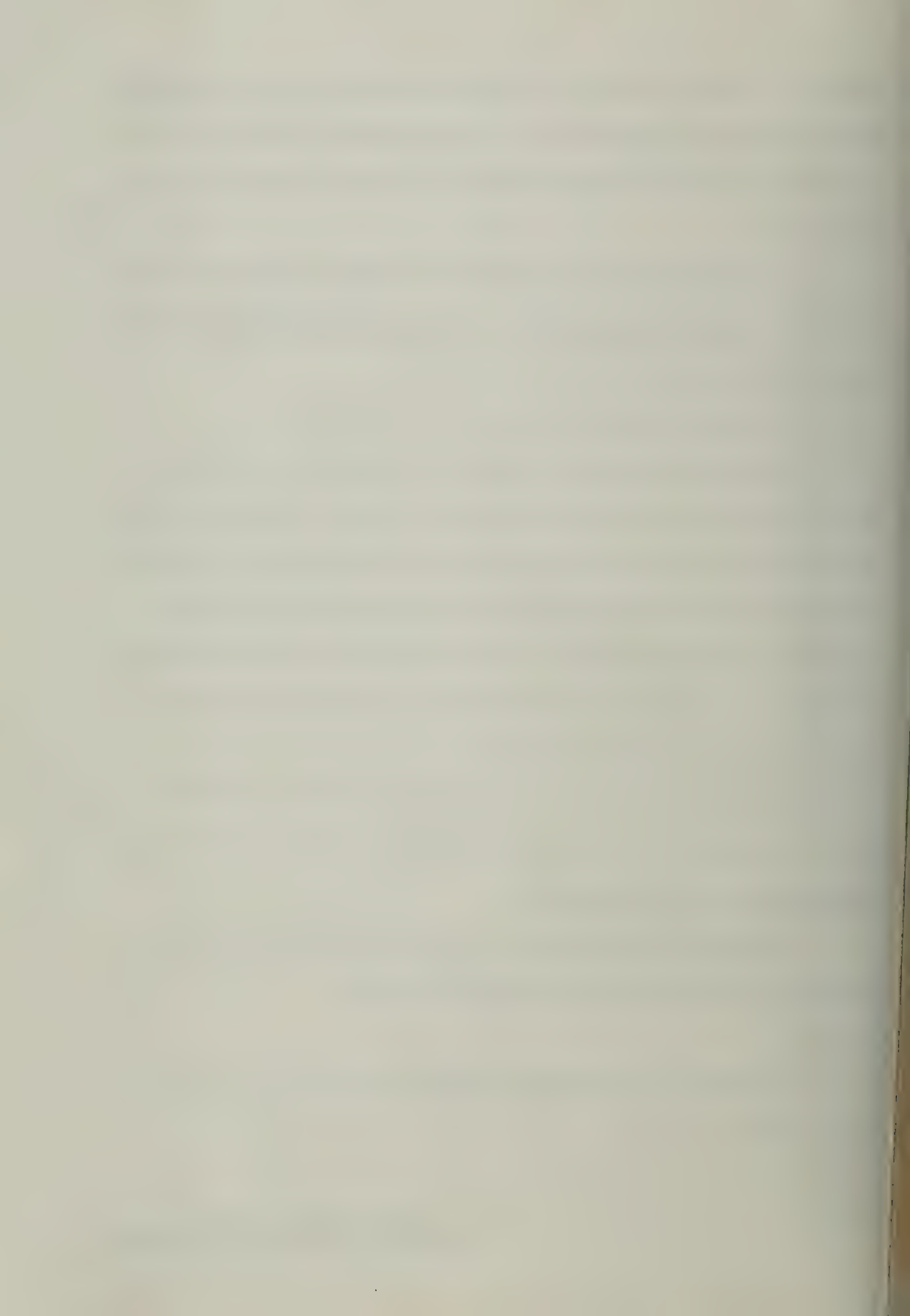
Under 17 U.S.C. 116, the defendant as the prevailing party is entitled to reasonable attorney fees which are hereby fixed in the sum of \$1,500.00.

Counsel for defendant will prepare appropriate Findings of Fact, Conclusions of Law, and Judgment.

DATED: Los Angeles, California, this 21 day of June, 1965.

PEIRSON M. HALL

United States District Judge



No. 20368

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHAPIRO, BERNSTEIN & Co., INC.,

Appellant,

vs.

4636 S. VERMONT AVE. INC., a California
corporation, doing business as
REED'S MUSIC STORE,

Appellee.

APPELLANT'S REPLY BRIEF

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FEB 10 1967

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No. 20368

IN THE
United States Court of Appeals
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SHAPIRO, BERNSTEIN & Co., INC.,

Appellant,

vs.

4636 S. VERMONT AVE. INC., a California
corporation, doing business as
REED'S MUSIC STORE,

Appellee.

APPELLANT'S REPLY BRIEF

THE FACTS

Defendant's* statement of the case ignores the serious nature of its infringements of plaintiff's copyrights, attempts to picture defendant as a blameless innocent, and castigates plaintiff for seeking to protect its business and valuable copyrights by the only remedy given to it, an action for infringement. Not only is the defense of innocence immaterial, but it is seriously open to question in view of the testimony of defendant's President. Even more important, defendant's statement of the case contains many substantial errors and misstatements of facts. Before proceeding to a rebuttal of defendant's legal arguments, the following errors of fact should be noted.

* Throughout this brief, as in the Opening Brief and in Appellee's Brief, Appellant will be referred to as plaintiff and Appellee as defendant, and their respective briefs as "Op. Br." and "Deft's Br.".

1. Defendant claims that the only transaction to be considered was the infringing sale made to Tempesta, and that evidence of damage and profit from other infringing sales by defendant is outside any issue. (Deft's Br., pp. 9-10). To the contrary, all sales by defendant of the books constituted one "infringement" of each of plaintiff's copyrights. *Advertisers Exchange v. Hinkley*, 199 F.2d 313 (8th Cir. 1952) cert. denied 344 U.S. 921 (1953). At the time the action was filed, plaintiff knew only of the sale to Mr. Tempesta, but evidence as to other sales and books held for sale was properly introduced to show the nature and extent of the total infringement by defendant. Infringement occurs with one sale, but, in determining the applicability of the damage and injunctive remedies for the copyright owner, the Court should and must consider the volume of infringing activity. There was no need to amend the pleadings to allege the additional sales, because the basic issues were the infringements.

2. Defendant claims that "Plaintiff offered no evidence that any of the four books other than Pltfs. Ex. 1 contained any of Plaintiff's copyrighted songs" (Deft's Br., p. 9). Defendant's President expressly testified that all four of the "#1" books sold or held by him contained each of plaintiff's songs (2 Tr. 92). Further, defendant had the fourth book in its possession and could have shown that plaintiff's songs were not included, if such had been the case. All four of the books were in fact identical in their infringing contents. There is a possibility that some or all of the other 12 fake books sold by defendant contained copies of plaintiff's songs, but this could not be established because defendant had disposed of them prior to suit (2 Tr. 79-80).

3. To support the argument that plaintiff should be penalized for bringing this action, defendant states that

plaintiff “pushed for trial, continuing to demand \$3,000” despite knowing “the amount of defendant’s profit and that their [sic] damage was not substantial” (Deft’s Br., p. 11). To the contrary, plaintiff knew that it was substantially damaged and did not know the extent of defendant’s profits from infringing sales (and also had no means of ascertaining the amount of such profits) (2 Tr. 81-84, 90-91). Defendant’s good faith in proceeding to trial is fully supported by these facts, considered in the light of the numerous authorities cited in Appellant’s Opening Brief. Therefore, the findings of the District Court quoted by defendant are clearly erroneous (Deft.’s Br., pp. 11-12).*

4. Defendant states (without record citation) that its president purchased plaintiff’s Exhibit 1 (the copy sold to Tempesta) on May 31, 1962 (Deft’s Br., p. 3). This is contrary to the president’s testimony that it was impossible for him to tell when plaintiff’s Exhibit 1 was purchased and which of the various copies were sold or to whom (2 Tr. 96-97, 125-126).

5. Defendant states that it was “innocent and totally blameless,” quoting its president’s protestations of innocence and lack of intent to infringe (Deft’s Br., pp. 6-8). Even if such evidence were material, which it is not (as shown by cases cited hereinafter), the record demonstrates the clear probability that defendant knew these books were not legitimate. That evidence is very well summarized at pages 9-12 of the brief of the Amicus Curiae, Music Publishers Protective Association.

* It should also be noted that the trial court did not refer to any alleged lack of good faith in its Memorandum Opinion (Appendix B, Deft’s Br.). That concept was introduced by defendant’s counsel in findings prepared for the trial court, in an attempt to bolster the award of \$1,500 to the defendant infringer.

In this connection, defendant (Deft's Br., p. 3, footnote 5) gratuitously and erroneously claims that the revocation of "Mel Alan's" sentence was "perhaps" the result of "Mr. Bleeker's complete cooperation with the plaintiff in this case." Bleeker not only did not cooperate with the plaintiff in this case in any way, but his refusal to recognize the consequence of defendant's illegal actions brought about the erroneous decision below.

6. Defendant now admits that there is *no* evidence that Tempesta was an agent of the plaintiff, but contends that agency is an inference which the trial court could draw from the bare, stipulated facts as to him (Deft's Br., pp. 5-6). Those bare facts have been correctly and fully stated by plaintiff (Op. Br., p. 5). There can be no inference of agency arising from them, due to the complete lack of any evidence (a) that plaintiff controlled or had the right to control his conduct with respect to the investigation of defendant's store, and (b) that there was any agreement between plaintiff and Tempesta, or prior consent or knowledge, as to his visit to defendant's store. The Court's finding of such agency is clearly erroneous for the reasons previously stated (Op. Br., pp. 27-28).

7. Defendant now claims that its repeated stipulation (1 Tr. 120; 2 Tr. 8-11) that its acts of infringement were without "the previous solicitation, procurement, knowledge, consent or authority of the plaintiff" does not mean what it says (Deft's Br., p. 6). Defendant argues that the word "previous" only means prior to the day of sale to Tempesta. To the contrary, the stipulation means exactly what it says, that is, plaintiff had no knowledge of defendant's infringing sales to others or of the infringing sale to Tempesta before the book was transmitted to plaintiff. Tempesta asked for a "fake" book, and defendant voluntarily sold him a copy of the infringing work,

as defendant did to other persons. Hence the stipulation must be given its plain meaning.

8. As a further part of its attack upon plaintiff's motives here, defendant surmises that "perhaps plaintiff's agents were unsuccessfully trying to purchase another fake book from defendant." (Deft's Br., p. 10). This is so clearly false that it should be censured by this Court.

9. Defendant states that it is "a small family corporation having three employees" (Deft's Br., p. 2), citing deposition testimony of its president. That showed only that he was president and a majority stockholder of defendant, his wife a vice president, and another man the secretary. There was absolutely no evidence anywhere as to the identity of other stockholders of defendant, the volume of its business, the amount of its capital, or other business facts.

10. Lastly, defendant states that it offered to impound the book it admitted still possessing (Deft's Br., p. 9). The only support for this is a footnote in the trial court's Memorandum Opinion, which is absolutely without support in the record. There was no pretrial or trial offer by defendant to allow an injunction to be taken or to deliver up the remaining infringing copies of the book. The entire trial transcript is before this Court, and it can be seen that such was the case.

ARGUMENT

I. AN AWARD OF STATUTORY "IN LIEU" DAMAGES IS MANDATORY WHEN THE COPYRIGHT OWNER CANNOT OR DOES NOT PROVE ACTUAL DAMAGES.

Defendant's first and primary argument is that a district court has complete, unfettered discretion to re-

fuse to render a judgment against a copyright infringer, or to make an award in any amount from one cent upward, rather than an award not less than the statutory minimum, whether as actual damages or profits or as "in lieu" damages (Deft's Br., pp 13-16). This is directly contrary to decisions of the Supreme Court, courts of appeal including this Honorable Court and numerous district courts. Such a principle would thwart the basic purpose of section 101(b) of the Copyright Act "to give the owner of a copyright some recompense for injury done him in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935).

If the defendant's theory of complete discretion were correct, then the Supreme Court was clearly in error in *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919) (see Op. Br., pp. 17-18). There the trial court ruled that the plaintiff copyright owner had proved actual damages, but only in a nominal amount, from an innocent, profitless infringement, and awarded \$10 per infringement. This judgment was reversed by the Supreme Court, with directions to award plaintiff minimum damages of \$250 per infringement. In language previously quoted in full (Op. Br., p. 18) the Supreme Court said a District Court "has no discretion" to give less than the minimum nor more than the maximum statutory damages when the copyright owner is unable to prove its actual damages.

Likewise, *Jewell-LaSalle Realty Company v. Buck*, 283 U.S. 202 (1931), unequivocally held that "in a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages," the trial court is "bound by the minimum amount of \$250" (p. 203). Defendant there argued that the trial court had discretion to award only the \$10 per performance set forth in the fourth subdivision of the statute (17 U.S.C.

§ 101(b)). The court answered that “unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of \$250 *must* be made” (p. 208) (Emphasis here, as elsewhere, is supplied unless otherwise noted). *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962), *Chappell & Co., Inc. v. Palermo Cafe Co., Inc.*, 249 F.2d 77 (1st Cir. 1957), *Irving Berlin, Inc. v. Daigle*, 31 F.2d 832 (5th Cir. 1929), *Universal Statuary Corporation v. Gaines*, 310 F.2d 647 (5th Cir. 1962) and *Amsterdam Syndicate, Inc. v. Fuller*, 154 F.2d 342 (8th Cir. 1946) reversed trial court judgments granting the copyright owners no recovery or only nominal damages for infringements no more damaging or profitable than those here involved. If the trial court had the unfettered discretion stated by defendants, those decisions were all plainly erroneous.

Defendant relies completely for its argument upon *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952). Defendant's reliance is misplaced, because *Woolworth* does *not* hold or state that minimum damages are to be given only when the trial court chooses to do so. *Woolworth's* profits of \$899.16 were *more than* the \$250 minimum statutory damages, but less than the statutory maximum of \$5,000 awarded by the trial court. The only question presented to the Supreme Court was whether the trial court's exercise of discretion within the \$250-\$5,000 minimum-maximum limitations was further circumscribed by the proof of the infringer's profits. The judgment for *maximum* statutory damages of \$5,000 was affirmed.

The Supreme Court in *Woolworth* was not concerned in any way with the award of *minimum* damages for a copyright owner who cannot prove a greater amount of actual damages. By citation with approval of *Westermann* and *Douglas*, it affirmed their holding that an

award of minimum statutory damages is mandatory in such circumstances. The discretion or choice of the trial court discussed in *Woolworth* is that which can be exercised when both actual damages and profits are sufficiently proved in an amount above the statutory minimum. In such a situation, the trial court can choose between a computed award and a statutory award. The line between the two different types of situations is shown by the following quotation from *Westermann* in the *Woolworth* opinion:

“‘In other words, the court’s conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in *every* case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court’s discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them.’” (p. 232).

This is followed in the next paragraph by Mr. Justice Jackson’s own succinct statement of the rule:

“The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute.” (p. 232).

The opinion in *Woolworth* must be read and considered in the light of the discussion of the history of this statute contained in *Westermann*. That discussion makes abundantly clear that a minimum of \$250 per infringement applies whether a computation of actual damages

and profits is made by the trial court, or an award under the "in lieu" clause is made. That portion of the opinion is attached hereto as Appendix A.

Contrary to defendant's interpretation of *Woolworth*, the courts of appeal which have considered the matter have cited *Woolworth*, with *Westermann* and *Jewell-LaSalle*, as authority that the minimum of \$250 is mandatory where actual damages in excess of that amount are not or cannot be proved. *Markham v. A. E. Borden Co., Inc.*, 221 F.2d 586, 588 (1st Cir. 1955); *Chappell & Co., Inc. v. Palermo Cafe Co., Inc.*, *supra* at 82; *Universal Statuary Corporation v. Gaines*, *supra* at 648.

There is a fundamental fallacy at the heart of defendant's argument that the trial court here had discretion to award nothing, or something less than the minimum \$250. It is casually stated in a footnote at page 14 of its brief: "*Both profits and damages may not be recovered.*" This is clearly erroneous.

First, the decision in *Woolworth* directly held that both profits and damages are recoverable by the copyright owner, allowing that owner to recover both *Woolworth's* profits of \$899.16 and damages of more than four times that amount. It noted that "a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers" (p. 233). The opinion always uses the conjunctive "and" between "damages" and "profits," not the disjunctive "or."

Second, the statute expressly requires recovery of both profits and damages. It says: "To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, *as well as* all the profits which the infringer shall have made from

such infringement, . . . or in lieu of actual damages *and* profits. . . .” 17 U.S.C. §101(b).

Third, the authorities cited by defendant in its casual footnote do not support it. Nimmer and Howell both state that authority is somewhat divided on this question. *Universal Pictures v. Harold Lloyd*, 162 F.2d 354 (9th Cir. 1947), decided only that both profits and damages could not be cumulated where the trial court’s estimate of damages was based upon widely conflicting evidence and far exceeded the lowest estimates plus allocated profits.

Lastly, both elements must be considered and awarded to the copyright proprietor for an infringement, because there is no relationship between the copyright owner’s damages and the infringer’s profits, if any. A profitless infringement may be tremendously damaging, or vice versa. (See Op. Br., p. 31).

Defendant’s fallacious theory of complete discretion to choose either profits or damages as the measure of recovery, without regard to the statutory minimum, was adopted by the trial court here. It ignored the broad nature of plaintiff’s damages and concentrated its attention on the matter of defendant’s profits, which it erroneously found to be nominal. The theory is clearly erroneous and should be rejected by this Court, as it did in *Buck v. Bilkie*, 63 F.2d 449 (9th Cir. 1933), with the same result of reversal of the judgment below.

II. THE TRIAL COURT ABUSED ITS POWERS IN REFUSING TO AWARD MINIMUM STATUTORY DAMAGES TO PLAINTIFF.

In pursuit of its erroneous primary theory of discretion, defendant next argues that “the only issue here is whether Judge Hall abused his discretion in refusing to award statutory damages.” Defendant contends that

there was no abuse of discretion because, it says, plaintiff was not damaged and the defendant's profit allegedly was \$.23 (Deft's Br., pp. 20-21). Both the principle and its application are erroneous.

As shown by more than 35 cases cited in our opening brief (pp. 17-22, 31-35) and the cases in section I above, the trial court does not have the discretion to award less than minimum damages in circumstances like those presented here of actual, but unprovable, damages.

Likewise, defendant's argument that plaintiff was not damaged is clearly erroneous. Defendant asserts that Finding No. 17 (1 Tr. 230) is supported by the record, for which it cites only certain portions of the testimony of plaintiff's witness Hoagland, as well as the court's comment during argument. Although it concedes that Mr. Hoagland testified that the plaintiff was damaged, defendant contends that the trial court rejected that testimony entirely. The finding is that there was "no evidence of any damage to the plaintiff." There *was* such evidence, as defendant admits. Further, the testimony cited by defendant is not the only testimony and evidence pertaining to the fact of damage, as set forth fully at pages 23-27 of Appellant's Opening Brief.

Defendant claims that the lack of corroborating documentary evidence of a loss of sales is significant (Deft's Br., pp. 18-20). But plaintiff showed that no documentary evidence of damages was introduced because none was available which would be admissible as against defendant. While plaintiff had sales records showing sales of the sheet music of the twelve copyrighted compositions to jobbers and wholesalers in Los Angeles, it had no records which showed in any way the amount of sales by such persons or any other persons within Los Angeles, much less in defendant's business territory, whatever that might be. Los Angeles-based jobbers and dealers sold

throughout Southern California and Arizona, and it was impossible to tie any decline in sales to them to the local area possibly served by defendant. Further, there was no way to establish a causal link between the amount of sales to them and the defendant's activities. Defendant objected to general evidence of decline of sales of these copyrighted songs (2 Tr. 18-19, 28). Hence, there is no significance to the absence of documentary evidence on decline of sales of the copyrighted songs due to defendant's infringing sales. Such evidence does not and could not exist.

In addition, the fact of damage was corroborated by the very nature of the fake books sold by defendant. Comparison by the public of the plaintiff's sheet music and authorized collection of songs (Pltf. Exs. 5, 6 & 7) with the infringing collection sold by defendant at "cut rate" would inevitably result in damage, injury and loss of value of plaintiff's songs. Price, printing and completeness of lyric and music are all elements of the value of plaintiff's songs, and the books sold by defendant degrade and devalue each such element. Also, the intangible injury to plaintiff's contractual duty to composers to protect the copyrights, and injury to its customer relationships are elements that must be considered (2 Tr. 33-35).

Defendant suggested, and the trial court adopted, a contrived argument that plaintiff was not damaged because one of the infringing books was purchased by Tempesta, allegedly as plaintiff's agent. This is fallacious on several grounds. It ignores defendant's sales of other copies of the infringing book to unknown persons, which were an integral part of the infringement (2 Tr. 81). Tempesta was not plaintiff's agent in his activities (Op. Br., pp. 27-28). Plaintiff *was* engaged in selling its copyrighted songs in the Los Angeles area in June 1962, contrary to defendant's assertion (2 Tr. 36).

As to profits, defendant's argument that its profits were only \$.23 is likewise clearly erroneous. Defendant's only witness could give the court no idea or estimate of the possible profits of the defendant on all sales of the infringing book. He did not know the sales prices of the books and had no way of ascertaining them (2 Tr. 81-84). Further, an arbitrary equal apportionment of profits for each song was not warranted. The inability of plaintiff or defendant to ascertain defendant's actual profits has been shown (Op. Br., pp. 25-31).

The quotation by defendant from *Universal Pictures, Inc. v. Lloyd* (Deft's Br., p. 22) shows on its face its inapplicability. The Court held in *Universal* that, since the District Court had determined on voluminous evidence the very large amount of damages of plaintiff and the amount of profits earned by defendant from the infringement, there was no need to use the statutory minimum. Plaintiff had there chosen proof of actual damages apparently because of the greater amount of recovery it could obtain through such evidence.

III. DEFENDANT IS IN ERROR IN ARGUING THAT AN AWARD OF STATUTORY DAMAGES IS AN "ABUSE OF DISCRETION".

Defendant cites and quotes extensively from four cases for the proposition: "Where plaintiff fails to prove real and substantial damage and defendant proves profits with certainty, an award of statutory damages is an abuse of discretion." Unfortunately for defendant, the cases upon which it attempts to rely for this proposition have been disapproved or ignored in subsequent decisions, including the Supreme Court decision in *Woolworth*.

Defendant cites *Davilla v. Brunswick, Balke, Collender Co.*, 94 F.2d 567 (2nd Cir. 1938), *Sammons v. Colonial Press, Inc.*, 126 F.2d 341 (1st Cir. 1942) and *Malsed v.*

Marshall Field & Company, 96 F.Supp. 372 (W.D. Wash. 1951). Defendant failed to state that they were all overruled *sub silentio* by the Supreme Court in *Woolworth*. At the outset of that opinion, Mr. Justice Jackson noted that certiorari had been granted on issues pertaining only to the measure of recovery by the copyright owner "as to which conflict appears among lower courts," citing the conflict between the Court of Appeals decision in the *Woolworth* case and the decisions in *Davilla*, *Sammons* and *Malsed* (p. 229). He then held in accordance with the Court of Appeals decision in *Woolworth*, affirming it and the District Court and, therefore, certainly disapproving *Davilla*, *Sammons* and *Malsed*. This is made even more evident by the citation of *Davilla* and *Sammons* in the dissenting opinion. Obviously, the Supreme Court found the defendant's decisions to be unacceptable interpretations of the copyright law.

Further, *Davilla* involved only profits *above* the \$250 minimum. The Second Circuit in subsequent cases held minimum damages to be mandatory when the copyright owner cannot prove damages, even though profits are non-existent or minimal. In *Nikanov v. Simon & Schuster, Inc.*, 246 F.2d 501 (2nd Cir. 1957), it affirmed the judgment for \$5,000, the maximum statutory amount, "despite the fact that 'Invitation to Russian' [the defendant's infringing book] was not itself a profitable publication." (p. 504) In *Burndy Engineering Co., Inc. v. Sheldon Service Corp.*, 127 F.2d 661 (2nd Cir. 1942), the court affirmed a judgment for statutory damages despite extensive evidence that defendant's profits were only a fraction of the total statutory amount. The court noted expressly that there was "no proof of the amount of the plaintiff's damages" (127 F.2d 661, 662). Indeed, in its most recent decision on this matter, the Second Circuit held that the copyright owner could recover both the infringer's net profit *and* an amount within the

statutory minimum-maximum in lieu of actual damages which it could not prove. (*Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.*, 329 F.2d 194 (1964)).

As to *Sammons*, it likewise has been disapproved by the circuit in which it was rendered. In *Markham v. A. E. Borden Co., Inc.*, *supra*, the court held that the statutory minimum damages must be awarded to the copyright owner who produced no evidence of the amount of its damages, and there was *no profit* whatever to the infringer from the infringements. See, to the same effect, *Chappell & Co., Inc. v. Palermo Cafe Co., Inc.*, *supra*, and *Widenski v. Shapiro, Bernstein & Co., Inc.*, 147 F.2d 909 (1st Cir. 1945).

As to *Malsed*, the plaintiff there failed to prove the *fact* of damage, the court noting her testimony showed “conclusively that *she had suffered no damage*” (p. 375; emphasis by the court). Further, the court found that plaintiff had been guilty of laches and had never exploited the copyright “in a manner that would be harmed by competition and unauthorized use.” It would also appear that the author of that opinion, Judge Yankwich, changed his views subsequently by reason of the decision in *Woolworth* and decisions in other appellate courts. See *Harms, Inc. v. F. W. Woolworth Co.*, 163 F.Supp. 484, 486 (S.D.Cal. 1958).

Likewise, as to the fourth case cited by defendant, *Washingtonian Publishing Co. v. Pearson*, 140 F.2d 465 (D.C. Cir. 1944), that plaintiff utterly failed to prove it had in fact been damaged, much less any certain amount of damage. The evidence was uncontradicted that plaintiff had ceased publication of its copyrighted magazine a year before defendant’s book appeared, that plaintiff was not selling or attempting to sell its magazine, and that plaintiff had not even obtained a copyright until six months *after* defendant’s book was published.

Therefore, defendant's purported proposition stated in its Section III lacks any binding precedent.

IV. AN AWARD OF STATUTORY DAMAGES IS NOT PUNISHMENT OF THE INFRINGER.

Defendant next argues that an award of minimum damages to the plaintiff would inflict a penalty and be in the nature of punishment. But, the minimum damages of \$250 are "just" in the contemplation of the statute. *Douglas v. Cunningham*, supra, (p. 210). The Supreme Court had earlier directly disposed of the contention that the award of statutory damages could ever be considered a matter of penalty or punishment, rather than of damages:

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the fact of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in *any* case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. . . .

"Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence

what the amount is which has been actually sustained.” *Brady v. Daly*, 175 U.S. 148, 154, 157 (1899).

Defendant cites only *Turner & Dahnken v. Crowley*, 252 Fed. 749 (9th Cir. 1918) to support its argument. As defendant’s summary shows, the award against the infringer there was above the statutory minimum and, therefore, within the discretionary limits of the “in-lieu” provision. No question of the statutory minimum was involved. Further, we suggest that *Turner & Dahnken* might be decided differently today in light of the subsequent Supreme Court decision in *Douglas v. Cunningham*, *supra*.

V. AN INFRINGER’S ALLEGED INNOCENCE IS IMMATERIAL TO THE MATTER OF AWARD OF STATUTORY DAMAGES.

At page 30 of its brief, defendant states that “defendant’s innocent intent may preclude an award of statutory damages,” for which it cites as authority a severely cropped quotation from *Nimmer on Copyright* (1965). The full text shows that Nimmer believes innocent intent is *not* a defense to an award of damages. The cases cited by him with regard to the effect of innocence upon remedy deal with situations completely different than those presented here, such as omission of the copyright notice by the plaintiff, or reliance by a defendant upon a wrongful copyright registration certificate of another.

Defendant fails to cite Nimmer for the matter directly in issue here, that is, whether or not it was mandatory for the trial court to award minimum statutory damages. On that subject, Nimmer states:

“It is submitted that the proper construction of the ‘in lieu’ clause is to render it not only permissive, but mandatory when no injury is proved. . . .

“If injury is proved but neither the amount of plaintiff’s actual damages nor defendant’s profits can be ascertained then the ‘in lieu’ measure of damages must be applied.” *Nimmer on Copyright* (1965), pp. 679, 680.*

A large number of the authorities cited in our opening brief hold that innocence is no defense to an award of statutory damages. See, for example, *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (8th Cir. 1939); *M. Witmark & Son v. Calloway*, 22 F.2d 412, 414 (E.D. Tenn. 1927).

“. . . There remains, therefore, only the question of damages against Hearst, in view of the court’s finding that its copying was ‘innocent.’ . . .

“So far as copyrighted material is concerned, the authorities are too conclusive to allow of doubt. Indeed, the inference from the copyright law itself would seem to be most direct; for, while it makes significant distinctions in certain instances based on innocent or willful infringement, as the case may be, it does not do so in the general provision for award of profits and actual damages, or those statutory sums allowable in the court’s discretion in lieu of actual damages. 17 U.S.C.A. § 25(b); cf. *ibid.* §§ 20, 28. . . .” (*De Acosta v. Brown*, 146 F.2d 408, 410-411 (2nd Cir. 1944)).

* Mr. Nimmer was also the attorney for the copyright owner who obtained an award of \$500 minimum statutory damages for innocent, non-injurious infringement by a church choir director, in a reversal of the trial court which had refused to award any damages, although finding infringement. *Wihl v. Crow*, *supra*. Thus, Mr. Nimmer practices what he preaches.

VI. THE TRIAL COURT ERRED IN REFUSING AN INJUNCTION AND AWARDED ATTORNEYS' FEES TO THE INFRINGER.

Defendant attempts to justify the trial court's refusal of injunction against further infringement by stating that defendant established the absence of any threat of continuing or additional infringements through testimony of its president. He testified that he had at least one of the infringing books in his possession (2 Tr. 81). There was no removal of the inherent threat raised by the possession of this infringing work. Further, an injunction is particularly warranted here where the infringer has been rewarded for his activities and given a free shooting license against plaintiff's copyrights by the trial court. (See Op. Br., p. 39).

In defense of the trial court's award of attorneys' fees to it despite its infringements, defendant argues that "Plaintiff's refusal to accept the Supreme Court decision in the *Woolworth* case is sufficient grounds alone" for the award and, further, that the award would be correct even if plaintiff's claim were only "unreasonable" (Deft's Br., p. 31). Defendant's argument is erroneous.

(1) Plaintiff not only "accepted" the decision in *Woolworth* in the trial court and this court (Op. Br., pp. 19-20) but relies on it. The good faith of plaintiff in prosecuting this action is more than abundantly shown by the multitude of cases from the Supreme Court and the Courts of Appeal which fully support its position here, including *Woolworth*. Even if defendant's interpretation of *Woolworth* were correct, which it patently is not (pp. 7-9, supra), plaintiff would still be in good faith in urging the trial court to exercise discretion to grant it "in lieu" damages, which *Woolworth* held were proper and justifiable.

(2) Defendant cites *Buck v. Bilkie, supra*, in support of the award of attorneys' fees to it. This is a truly amazing citation. As plaintiff pointed out (Op. Br., p. 21), this court in *Buck* held that an award of the minimum statutory damages was *mandatory* in the absence of proof of actual damages, and reversed the trial court's decree which had refused any damages. As to attorneys' fees, all that *Buck* held was that the trial court need not award them to the copyright owner in such circumstances. This is not in issue here, because plaintiff has not specified as error the failure of the lower court to award attorney's fees to it.

(3) Defendant's citation of *Rose v. Bourne*, 176 F. Supp. 605 (S.D. N.Y. 1959), is equally erroneous. There, plaintiffs entered a voluntary dismissal of their claim and defended against a counterclaim on what the court termed "frivolous" grounds, specifically a Supreme Court decision squarely on the same facts and adverse to their position.

(4) Lastly, defendant's only precedent for awarding attorneys' fees to a defendant because a copyright owner's claim was "unreasonable" is clearly distinguishable. *Mailer v. R.K.O.*, 332 F.2d 747 (2nd Cir. 1964), involved a claim for alleged reversion of copyright to Mailer after the defendant had expended two million dollars in making a motion picture of the copyrighted material under license from Mailer. The court found that there was *no infringement*, and that Mailer's arguments for reversion were "highly technical". In the present case, of course, complete infringement was found, and plaintiff's arguments are not technical but substantive.

VII. DEFENDANT HAS NOT DISTINGUISHED PLAINTIFF'S AUTHORITIES.

In Section VII of its brief, defendant attempts to discuss and distinguish only four of the cases cited by plaintiff in its opening brief. Defendant ignores the mass of Court of Appeals and District Court decisions supporting plaintiff with the casual statement that it does not have “enough space to analyze” those cases. The Court can readily see that defendant utilized in its brief less than half of the number of allowable pages.

Defendant further justifies its refusal to discuss the mass of decisions cited by plaintiff with the statement that “most” of them were “prior to the *Woolworth* decision” (Deft’s Br., p. 31). To the contrary, many of the significant cases fully supporting plaintiff’s position here were decided subsequent to *Woolworth*, and are listed in Appendix B hereto. All the cases cited by plaintiff are simply too significant and too numerous to be swept under the rug by defendant. We are confident that this Court will give them their proper weight and controlling effect.

Defendant suggests that plaintiff’s cases involve a choice by the court, “without saying so,” to award statutory damages rather than actual damages and profits, and that minimum damages are mandatory only after “in lieu” damages are chosen as the appropriate remedy (Deft’s Br., p. 32). It is impossible to read the decisions and come to defendant’s conclusion that the courts were silently following such a thought pattern. Such a concept is directly contrary to the express statements and holdings that minimum statutory damages are mandatory when a copyright owner is unable to prove its damages. (Op. Br., pp. 20-22, 31-35.) Such a thought flies in the face of the clear fact that in cases such as *Buck v. Bilkie* in this Circuit, and *Wihtol v. Crow*, *supra*,

Chappell & Co., Inc. v. Palermo Cafe Co., Inc., supra, *Universal Statuary Corporation v. Gaines, supra*, *Irving Berlin, Inc. v. Daigle*, 31 F.2d 832 (5th Cir. 1929), and *Amsterdam Syndicate, Inc. v. Fuller*, 154 F.2d 342 (8th Cir. 1946), a decision of the trial court was reversed for the sole reason that it failed to award minimum statutory damages for infringements. In each of those cases the trial court had attempted to exercise a discretion like that urged by defendant here, but the Courts of Appeal, including this Court, held that such conduct was erroneous. The discretion of the trial court occurs only in the area above \$250 per infringement.

Defendant's basic error concerning discretion is dramatically illustrated by its attempted distinction of *Westermann v. Dispatch Printing Co., supra*. Defendant states: "*Westermann* was a case in which the trial court clearly exercised its discretion to award statutory damages. Having done so, the Supreme Court held it could not award less than \$250." (Deft's Br., p. 33.) To the contrary, the trial court in *Westermann* attempted to exercise a discretion to award actual damages only, which it held to be a nominal \$10 for each of seven infringements (233 Fed. 609, 611). The Supreme Court reversed, holding that there were seven infringements and the \$250 minimum must be applied to each of them. It was uncontested that "defendant made no profits," that defendant was entirely innocent of any intent to infringe, and that plaintiff lost no sales as a result of the infringement, suffering only an intangible injury to its "system of business" (233 Fed. 609, 613). Thus, in *Westermann*, the trial court did *not* attempt to award "in lieu" damages, but actual, nominal damages and profits (thus giving the copyright owner more than the trial court did here).

Therefore, defendant's attempt to insert new language about discretion into the Supreme Court's opinion, as suggested at page 34 of its brief, is patently unwarranted.

Defendant's five further grounds for distinguishing *Westermann* (Deft's Br., p. 33) are equally without substance:

(1) Defendant did not prove its profits with certainty (Op. Br., pp. 29-31).

(2) Defendant claims that Westermann's damages were "real and substantial," while plaintiff's damages here were not. Westermann had not lost any sales, and its damages were the intangible ones to its "system of business" and its contract relationships (249 U.S. 100 and 103-4). Those damages were, therefore, no more real and substantial or of different types than plaintiff's here — "the discouragement of and the tendency to destroy his system of business" (see Op. Br., pp. 23-28).

(3) There is no significance in the form of the complaint's prayer for relief, because plaintiff, from the pretrial conference onward, sought only minimum damages, admitting its inability to prove actual damages, as well as defendant's profits, in a greater amount than \$250 (1 Tr. 121-122; 2 Tr. 129, *et seq.*).

(4) Defendant says that Dispatch Publishing Co. agreed that statutory damages should be awarded. To the contrary, that newspaper contested the imposition of the statutory minimum of \$250 in the trial court and in the Court of Appeals and succeeded in prevailing upon the trial court to enter judgment for only \$10 actual, nominal damages. Not until it was in the Supreme Court did the newspaper concede that the imposition of "in

lieu" damages was required, but it still contested the amount thereof.

(5) Lastly, defendant repeats its erroneous claim that plaintiff's agent "procured the infringement," unlike *Westermann*. But defendant sold two or more infringing books to unknown persons. Tempesta was not plaintiff's agent in making the purchase. Thus, plaintiff did not solicit or procure *any* of the infringing sales (1 Tr. 120; 2 Tr. 8-11; Op. Br., pp. 27-28).

Defendant next attempts to distinguish *Jewell-LaSalle Realty Company v. Buck*, *supra*, as holding the award of minimum statutory damages only "permissible" where the copyright owner makes no proof of actual damages (Def't's Br. pp. 34-35). Defendant states that this Court in *Buck v. Bilkie*, *supra*, "plainly misinterpreted *Jewell-LaSalle*" as requiring award of minimum damages for an infringement. It is defendant who has misinterpreted. The first question (numbered II) certified to the Supreme Court read: "In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the Court bound by the minimum amount of \$250. . . ." (283 U.S. 191 at 203). The Court answered "Yes" to that question, because "it was settled in *Westermann Co. v. Dispatch Printing Co.* . . . that for each publication \$250 is the minimum damages."

Just as significantly, the next certified question was: "Is Section 25(b)Fourth of the Copyright Act [now Section 101(b)] applicable, in the discretion of the Court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?" The answer:

"This question has in part been necessarily answered by our discussion of Question II, for unless

the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of \$250 must be made. Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages. See *Westermann v. Dispatch Printing Co.*, 249 U.S. 100, 106. Subject to this limitation, Question III is answered in the affirmative.” (p. 208)

Therefore, as clearly as it could, the Supreme Court held the minimum amount to be mandatory when the copyright owner had no proof of actual damages.

As its only authority for characterizing *Jewell-LaSalle*’s holding as “permissible,” defendant cites *Woolworth*. But the reference to *Jewell-LaSalle* in *Woolworth* was in answer to the infringer’s argument that, somehow, *Jewell-LaSalle* required limitation of a statutory award to not more than the infringer’s actual profits. *Woolworth* very rightly held that *Jewell-LaSalle* required no such result.

The defendant outlines the facts of *Douglas v. Cunningham*, *supra*, and presents a quotation from that opinion which has been so edited that it is misleading. The full text of that portion of the opinion is attached as Appendix C hereto. It should also be noted that the defendant publisher in *Douglas* was completely innocent in accepting the article from Cunningham and that evidence of its profits was apparently available.

VIII. DEFENDANT IS NOT ENTITLED TO ADDITIONAL ATTORNEYS' FEES TO COVER THE EXPENSES OF ITS BRIEF OR OTHERWISE.

As its concluding point, defendant requests that this Court award it additional attorneys' fees "to cover the expenses" of its brief. It argues that plaintiff's position is "wholly without merit and a continuation of the unreasonable attitude taken in the District Court." (Deft's Br., pp. 36-37.) For the reasons stated in the Opening Brief and this brief, it is evident that plaintiff's position is meritorious and, in view of the numerous authorities to support its position, there can be no possible justification for again penalizing plaintiff and rewarding the guilty infringer.

CONCLUSION

Defendant took a calculated risk in its business in order to capitalize on the best music "bargain" it had ever seen (2 Tr. 103). Its personnel were experienced in music and fully aware of copyrights (2 Tr. 86-87, 94-95, 123). It sold a number of the infringing books before detection, profiting thereby and irreparably damaging the value of plaintiff's business in general and these copyrights in particular. In order to protect contract relationships with its customers and the composers and to discourage such deprecations, plaintiff sought the statutory remedies given to it by Congress — minimum damages, an injunction and related relief. At trial, multiple infringements were established, but plaintiff was unable to prove its actual damages, despite proving without contradiction the fact of damage. The amount of defendant's profits could not be ascertained.

Despite these facts, the trial court refused plaintiff copyright owner any relief whatever and, instead, penalized it by awarding the infringer \$1,500. This strikes

at the foundation of the Copyright Act. From the very inception of that statute 100 years ago, the copyright owner who is unable to prove his actual damages in a greater amount has been entitled to not less than a prescribed amount (see Appendix A). The minimum statutory amount is barely sufficient to reimburse plaintiff for the costs of bringing suit for the vindication of its title, for the necessary protection of its copyrights, and for the prevention of further piracy of its property. That basic purpose and intent of the Copyright Act has been repeatedly recognized by the Supreme Court, this Court and other Courts of Appeal and District Courts. The errant decision of the District Court below should be reversed, with directions to enter judgment for plaintiff in the minimum statutory amount and an injunction.

Respectfully submitted,

O'MELVENY & MYERS
BENNET W. PRIEST
HENRY C. THUMANN

By BENNETT W. PRIEST

Attorneys for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

BENNETT W. PRIEST

APPENDIX A

“... An early statute required the infringer of a copyright in a dramatic composition to pay such damages ‘as to the court shall appear to be just,’ but ‘not less than’ a prescribed amount. Act August 18, 1856, c. 169, 11 Stat. 138; Act July 8, 1870, c. 230, §101, 16 Stat. 214. This statute became § 4966 of the Revised Statutes. A later statute provided that the recovery for infringing a copyright in an engraving should not be less than \$250 nor more than \$10,000, and for infringing a copyright in a photograph of an object other than a work of art should not be less than \$100 nor more than \$5,000. Act March 2, 1895, c. 194, 28 Stat. 965. In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the ‘in lieu’ provision now under consideration. True, they were broadened so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded — that of committing the amount of damages to be recovered to the court’s discretion and sense of justice, subject to prescribed limitations — was retained. The new provision, like one of the old, says the damages shall be such ‘as to the court shall appear to be just.’ Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation.

“In *Brady v. Daly*, 175 U.S. 148, which was an action to recover for the infringement of a copyright in a dramatic composition, the first of the earlier provisions — that in § 4966, Rev. Stats. — was much considered. The trial court was of opinion that, while the damages were to be such as appeared to it to be just, it could not go below the prescribed minimum; and it made the assessment accordingly. In this court it was contended that in this view the provision was penal and the action was one to recover a penalty. But the contention was

overruled and the judgment affirmed, the court saying, pp. 154, 157:

“It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

“The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. *In the face of the difficulty of determining the amount of such damages in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. . .*

“Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained.’

“It was after the minimum limitation was thus recognized as of controlling force in the assessment of the damages that the terms of the provision then under consideration were substantially repeated in the ‘in

lieu' provision of the revised act. This hardly would have been done had it not been intended that the limitation should be as controlling there as in the earlier statute. That it was intended to be thus controlling is shown by the reports of the committees on whose recommendation the act was passed. House Report No. 2222, and Senate Report No. 1108, 60th Cong., 2d sess." (*Westermann Co. v. Dispatch Printing Company*, 249 U.S. 100 at 107-109; emphasis added.)

APPENDIX B

Cases on statutory minimum damages decided subsequent to the decision in *Woolworth v. Contemporary Arts*.

Markham v. A. E. Borden Co., Inc.,

221 F.2d 586 (1st Cir. 1955);

Chappell & Co., Inc. v. Palermo Cafe Co., Inc.

249 F.2d 77 (1957);

Nikanov v. Simon & Schuster, Inc.

246 F.2d 501 (2nd Cir. 1957);

Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.,

329 F.2d 194 (2nd Cir. 1964);

Universal Statuary Corporation v. Gaines,

310 F.2d 647 (5th Cir. 1962);

Advertisers Exchange v. Hinkley,

199 F.2d 313 (8th Cir. 1952), *cert. denied*

344 U.S. 921 (1953 — the year after *Woolworth*);

Wihtol v. Crow,

309 F.2d 777 (8th Cir. 1962);

Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc.,

184 F.Supp. 285 (E.D.Pa. 1960);

Bourne, Inc. v. Romero,

23 F.R.D. 292 (E.D.La. 1959);

Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co., Inc.,

171 F.2d 603 (S.D.N.Y. 1959);

Edwin H. Morris & Company v. Burton,

201 F.Supp. 36 (E.D.La. 1961);

Edwin H. Morris & Company, Inc. v. Munn,

233 F.Supp. 71 (E.D.S.C. 1964);

Hedeman Products Corp. v. Tap-Rite Products Corp.,

228 F.Supp. 630 (D.C.N.J. 1964).

APPENDIX C

“This court has twice construed § 25 (b) in the light of its history and purpose. *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100; *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202. As shown by those decisions, the purpose of the act is not doubtful. The trial judge may allow such damages as he deems to be just and may, in the case of an infringement such as is here shown, in his discretion, use as the measure of damages one dollar for each copy,—Congress declaring, however, that just damages, even for the circulation of a single copy, cannot be less than \$250, and no matter how many copies are made, cannot be more than \$5000. In the *Westermann* and *LaSalle* cases it was held that not less than \$250 could be awarded for a single publication or performance. It follows that such an award, in the contemplation of the statute, is just. The question now presented is whether it can be unjust, according to the legislative standard, to use the prescribed measure,—\$1 per copy,—up to the maximum permitted by the section. As the *Westermann* case shows, the law commits to the trier of facts, within the named limits, discretion to apply the measure furnished by the statute provided he awards no more than \$5,000. He need not award \$1 for each copy, but, if upon consideration of the circumstances he determines that he should do so, his action can not be said to be unjust. In other words, the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute. . . .” (*Douglas v. Cunningham*, 294 U.S. 207, 210 (1935))

United States Court of Appeals
FOR THE NINTH CIRCUIT

SHAPIRO, BERNSTEIN & CO., INC.,

Plaintiff-Appellant,

vs.

4636 S. VERMONT AVE., INC., a California Corporation,
doing business as Reed's Music Store,

Defendant-Appellee.

FEB 10 1967

**BRIEF OF MUSIC PUBLISHERS' PROTECTIVE
ASSOCIATION, INC., *AMICUS CURIAE***

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JAN 28 1966

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STATUTE

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United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 20368

SHAPIRO, BERNSTEIN & Co., INC.,

Plaintiff-Appellant,

vs.

4636 S. VERMONT AVE., INC., a California corporation,
doing business as REED'S MUSIC STORE,

Defendant-Appellee.

BRIEF OF *AMICUS CURIAE*

Statement

This brief, of Music Publishers' Protective Association, Inc., *amicus curiae*, is submitted upon the written consent of both parties to the case, heretofore filed herein, and it is accompanied by proof of service on both of said parties. It is addressed to that part of the District Court's Findings of Fact and Conclusions of Law, and the Judgment made and entered pursuant thereto (R. 225-237, all references preceded by "R" being to the Transcript of Record), which involve § 1(a) and construe § 101 (former § 25) (a) and (b) of the Copyright Act, Act of March 4, 1909, c. 320, 35 Stat. 1075 *et seq.*, U.S.C. Title 17, as amended (pertinent parts "Appendix A" and "Appendix B").

Plaintiff's Respective Causes of Action

Plaintiff is a music publisher. Each of plaintiff's twelve causes of action is for the infringement by defendant of the copyright in one of plaintiff's musical compositions, protected under the copyright laws of the United States, by the unauthorized sale for defendant's own profit and gain, of a book entitled "Over 1000 Favorite Standard Songs, Volume 1" (Plaintiff's Exhibit "1") containing said twelve musical compositions, the music and lyrics of which compositions were printed, reprinted, copied, vended, arranged and adapted, as a part of said book, without the consent or authorization of plaintiff (R. 2-28).

Plaintiff's prayer for relief is for an injunction and that "defendant be decreed to pay to plaintiff such damages as plaintiff has suffered due to defendant's said unlawful acts, as well as all the profits which defendant has made from said unlawful acts, or in lieu of actual damages and profits, not less than the statutory minimum damages of two hundred fifty dollars (\$250) for each infringement of each copyright hereinabove set forth, in accordance with the provisions of the Act of Congress in such cases made and provided, making a total of not less than three thousand dollars (\$3,000)" (R. 28, 29).

The District Court's Pertinent Findings of Fact

The District Court found (references being to the respective paragraphs, R. 226-232):

1. Defendant "is and at all times herein mentioned was a corporation . . . doing business as Reed's Music Store at 4636 South Vermont Avenue, in the City of Los Angeles, State of California, Southern District of California,

Central Division. Defendant is primarily engaged in the sale of musical instruments, but about one-half of one per cent of its total sales is from musical compositions" (Par. 2).

2. "On or about June 13, 1962, defendant sold, distributed and vended to T. Tempesta one book entitled 'Over 1000 Favorite Standard Songs, Volume 1', hereafter referred to as the Book, which is a compendium of musical compositions" (Par. 3).

3. That "plaintiff at all times material to this action has been and still is the sole and exclusive proprietor of" twelve "of said musical compositions and the copyrights thereof and all rights thereto and thereunder", including "the exclusive right to print, reprint, copy, vend, arrange and adapt the music and lyrics of each of said musical compositions" (Par. 9(c)).

4. "Mr. Mel Alan, the person from whom defendant purchased the Book, had no consent or authority of plaintiff to print, reprint, copy, vend, arrange or adapt the music and lyrics of each of said musical compositions" (Par. 9(d)).

5. "Defendant sold, distributed and vended the Book containing the copies of said musical compositions . . . for defendant's own profit and gain" (Par. 10).

6. "The actual profits made are trivial but not difficult to ascertain. The defendant paid \$5.90 for the Book and sold it for \$25.00. Its total profit for the entire Book would be \$19.10, without deducting overhead. But since the book contained 1,000 songs, each song contributed .191 cents to the overall profit; hence the defendant made a profit of 22 plus cents from the sale of the twelve infringing songs" (Par. 16).

7. "There is no evidence of any damage to the plaintiff" (Par. 17).

8. "Prior to the service of the summons and complaint in this action, the defendant did not know that the songs in the Book were copyrighted, did not know that the plaintiff or anyone else had any rights in the songs, did not know that the purchase and sale of the Book would infringe any rights of plaintiff or any other person, and did not know that the publishers of the Book were infringing any rights of plaintiff" (Par. 18).

9. "The acts of defendant in selling, distributing and vending the Book were committed without knowledge of the rights and copyrights of plaintiff in and to each of the musical compositions" (Par. 19).

10. "Defendant did not intend to infringe" (Par. 20).

11. "On October 29, 1964, defendant offered a judgment in the amount of \$50.00, which was rejected by plaintiff. The case thereafter went to trial in November, 1964, on the issue of damages" (Par. 21).

12. That "plaintiff's prosecution of this suit on the theory that statutory damages were mandatory was not in good faith and was without any reasonable belief in the merits thereof. Plaintiff knew or should have known, in view of the Supreme Court decisions, that the argument lacked merit" (Par. 27).

13. "Defendant is a small family corporation engaged primarily in the business of the sale and rental of pianos and organs. . . . Mr. and Mrs. Jerry Bleeker are the president and vice-president, respectively, and Mr. Bleeker owns the majority of the stock. The defendant has three employees other than the Bleekers. The Court takes judi-

cial notice of the disparity between the financial resources of plaintiff and defendant'' (Par. 28).

14. ''The Court finds defendant's reasonable attorneys' fees to be \$1,500.00 for the period after October 29, 1964'' (Par. 29).

15. ''From the evidence in the case, the Court is not justified in concluding that there is any threat by the defendant to sell or continue to sell any of the copyrighted compositions, without plaintiff's permission'' (Par. 31).

16. ''Plaintiff's request for an injunction will be denied'' (Par. 32).

17. ''Plaintiff shall take nothing'' (Par. 33).

SUMMARY OF ARGUMENT

I

The District Court held that defendant infringed plaintiff's copyrights in the twelve songs yet the Court penalized plaintiff as the purported guilty party, based upon its untenable conclusions.

The District Court concluded: ''Defendant infringed plaintiff's copyrights in the twelve songs set forth in Paragraphs 5 and 7 of the Findings of Fact'' (Par. 2, references being to the respective paragraphs of the Court's conclusions of law, R. 232-233). Yet the Court penalized plaintiff, based upon the following untenable conclusions:

1. The amount plaintiff is entitled to recover ''is *de minimis*'' (Par. 3).

2. ''If either profits or damages are ascertainable'', the \$250 statutory minimum in Section 101(b) of the Act

“need not be resorted to. *Sheldon v. Metro-Goldwyn Corp.*, 309 U. S. 390 (1940)” (Par. 4).

3. The \$250 minimum provision “is the equitable substitute for cases which presented impossibility of proof as to damages and profits. *Douglas v. Cunningham*, 294 U. S. 207 (1935). Where no such difficulty exists, and where, on the contrary, exact proof of profits has been made and no other damages shown for the violation, there is no need to resort” to the \$250 statutory minimum (Par. 5).

4. The defendant, as the prevailing party, is entitled to costs including a reasonable attorney’s fee (Pars. 7, 8).

5. The plaintiff having commenced and prosecuted the action “in bad faith or unfairly, without justification, and without any reasonable belief in the merits of the claim alleged”, an award of attorney’s fees to defendant is justified (Par. 9).

6. The plaintiff, a large corporation, having placed “an economic burden on a small defendant in order to force the defendant to yield to its unjust demands, attorneys’ fees are properly awarded to the defendant and prevailing party” (Par. 10).

II

The District Court’s determination was predicated upon an erroneous conception of the applicable legal principles.

Following are the untenable grounds upon which the adverse determination to plaintiff was based (all references being to the respective paragraphs R. 226-233, F. denoting Finding and C. denoting Conclusion):

1. There can be no recovery for an infringement in the absence of knowledge and intention (F. 18, 20).

2. The extent of plaintiff's proof of profits and damages is a material factor in determining its right of action (C. 3).

3. If either profits or damages are ascertainable, although trivial, there is no requirement to award the \$250 statutory minimum (C. 4).

4. There must be an impossibility of proof of both damages and profits, to require the award of the \$250 statutory minimum (C. 5).

5. That plaintiff's prosecution of this action on the theory that the \$250 statutory minimum was mandatory, although the Supreme Court decisions were to the contrary, was not in good faith and was without any reasonable belief in the merits thereof (F. 27).

6. That the Court takes judicial notice of the disparity between the financial resources of plaintiff and the defendant (F. 28).

7. That in view of the foregoing, defendant is the prevailing party and entitled to costs (C. 7).

8. The plaintiff, (a) having commenced and prosecuted this action in bad faith and unfairly, without justification and without any reasonable belief in the merits thereof and (b) being a large corporation which placed an economic burden on a small defendant, in order to force the defendant to yield to its unjust demands, attorneys' fees of \$1,500.00 should be awarded to defendant as the prevailing party (F. 30, C. 9, 10).

III

The inequity of the judgment entered pursuant thereto.

In accord with the foregoing, the Court adjudged "that plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff its costs of action, including \$1500.00 as reasonable attorneys' fees" (R. 236).

IV

The District Court's determination that lack of proof of damages does not compel resort to the \$250 statutory minimum was directly contrary to its position upon the trial.

This is confirmed by the following discourse (RT 141, 143, all references preceded by RT being to the Reporter's Transcript Of Proceedings):

"The Court: What damages have they proved?

Mr. Hornbaker: They haven't proven any damages.

The Court: Well, if they haven't proven any damages, doesn't the statute come into effect?

Mr. Hornbaker: No it doesn't. No, it does not because the statute never comes into effect until the Court, in its discretion decides to impose the statutory minimum damages.

The Court: Well doesn't the cases say where the proof is lacking, proof of damages lacking, that the court then has resort to the statutory minimum damages?

* * * * *

The Court: Yes, but tell me precisely what you think their damages were, maximum. You say they prove nothing. Now, they proved something. Either they have proved something or it seems to me that the statutory minimum goes into effect."

V

The president of defendant having purchased the books under the most suspicious circumstances with conceded knowledge of their infringing content, the District Court's censure of plaintiff was a wholly unfounded abuse of plaintiff's impregnable legal status.

Contrary to the District Court's determination, intention to infringe is not essential under the Act and unconscious plagiarism is actionable as much as deliberate.

Even upon the trial the Court ruled directly contrary to its subsequent determination. "The Court: All you have is one sale here. All the other sales were admitted to counter the defendant's contention that they have no intent to violate the statute. I don't think that intent makes any difference" (RT 131). However, the Court's subsequent finding to the contrary, of defendant's unquestionable innocence, was the material factor in influencing its unprecedented adverse determination to plaintiff. In this respect, it is noteworthy that the Court disregarded the testimony of defendant's president, which was completely at variance with the Court's said finding.

Following are the pertinent references to the testimony of defendant's president, Jerome Bleeker:

1. He was "actively in charge of the business of the corporation as its president" (RT 53). The principal business of defendant was the retail sales and rentals of "pianos and organs" (RT 53). The sale of musical compositions was not "generally" a part of defendant's business activities (RT 59).

2. He was a professional musician. For "20 years", prior to organizing said business he had been "a pianist in an orchestra" and subsequently he was a "rehearsal pianist" in a "motion picture studio" (RT 86, 87, 113).

3. The term "fake book", as applied to the book containing the infringing compositions, "was just a group of songs put in a book form". If "a request is made to play a number in it, and you don't have the music, we, as musicians, would play the melody by memory and fake the harmony", so "that 'faking' really means faking in the harmony" (RT 54, 110).

4. The books were purchased from a party giving the name of "Mel Alan", who had called him on the telephone and subsequently came to defendant's place of business. He did not "recall" that Alan had a business card, the only address given him by Alan being a box number (RT 56, 60). He did not "question Mr. Alan at all about the background of the books, or where he obtained the material that was in them" and Alan did not "volunteer any information about that" (RT 58). He did not inquire of Alan "as to what publishing house or publisher he represented". He "just took for granted that he had the right to sell the books and which in turn should give me the right to sell them to the public", even "though his name does not appear anywhere on the books or any other publisher's name or distributor's name" (RT 124, 125).

5. He was familiar "with the form of copyright notice" appearing on musical publications, the "C" with a circle around it and then the "name of a person or the company as the copyright owner". Yet he did not "at any time from the time" he first had a conversation with Alan "intentionally or otherwise look at the inside and notice there was no copyright designation on any of the songs". He never "looked at them for that purpose" and he "didn't in just leafing through it, happen to notice that there was no copyright designation" (RT 87). If he would be asked if plaintiff's compositions were copyrighted he "would probably have to say" that he "would know that" (RT 89). That he "knew as a general matter", that "popular songs", as contained in the book, "were copyrighted" (RT 123).

6. There was no "title page", the "normal type of page, first page in the book, that has, like the cover, the name of it, and the publisher, and such information as that" (RT 99). He "was familiar with music collections, books, and sheet music", and knew "that they normally carried the name of the publisher and the date of the publication" as well "as the copyright notice" (RT 100, 101).

7. It came to his "notice" in his "examination" of the book "that the music scores as they are in there, and the words are in typescript in most cases rather than in printing", whereas "in volumes of authorized music" that he had "handled they are almost always printed" (RT 101).

8. That he could not "recall" having ever previously seen "any printed version of a song" that did not show the names of "the composer and lyricist" (RT 95).

9. The purchase price of the books was \$5.75 except in one instance it was \$5.90, whereby he obtained "a thousand songs of this caliber for \$5.75 which would result in a net price per song of one-half cent". He had never "seen a bargain like this before" (RT 103). The sales slip for this particular sale by defendant to a Mr. Tempesta was for \$25. However he "had no standard price". The salesman would know the cost "and we just sort of agreed, depending if it was a customer or who it may be, why, we would price it accordingly". However, the defendant did not "have any records which show the amount of money" obtained "from any one of the Volume No. 1's other than this sales slip made out to T. Tempesta". He "would have no way of knowing it". Accordingly, from his "records" he could not "determine the amount" received "from the sales of the other No. 1 books", or "for the sales of any of the other types of fake books" that he sold (RT 81-83). He thought it was "a good buy" for the customer "to get a thousand favorite songs in one book for a price of \$25 or less" and

wished he "would have had the opportunity" when he "was playing" (RT 90).

10. That, in accord with his prior testimony "any accounting journals or sales records sales slips or invoices or ledgers relating to the sales of 'Volume 1' of these fake books would not be identifiable as such" because he did not "enter that particular identification" on his records (RT 90, 91). After the initial purchase he had placed reorders for the books, because of the "market for them" and the "very good profit" he made. However, he had no definite recollection as to the total number he had purchased or how many he still had on hand (RT 60, 75, 80).

11. Because of the all too obvious infringing content of the book, he necessarily anticipated that eventually something would go wrong. This was confirmed by a communication from him to Alan of May 28, 1962, wherein, in referring to a reorder for copies of the book he stated "On May 4, you told me that you would send it charge as usual. Has something gone wrong?" (RT 75, 76). His fears were well grounded, for upon the trial there was received in evidence, without objection (Exhibit 4), four documents showing the subsequent "conviction of Mel Alan". One of the documents was "a certified copy of the indictment" in "the matter entitled United States of America v. Irwin Seymour Rosenberg, also known as Irwin Rogers, also known as Bob Adams, and Melvin Armand Gershwin, also known as Mel Alan". The other three documents were certified copies of the transcript of the proceedings. "These four documents show the indictment, conviction, sentencing, and revocation of probation of the person known as Mel Alan" (RT 22, 23).

ARGUMENT

I

Defendant's purported lack of knowledge or intent can not affect its liability for the infringements.

As was said in *Buck v. Jewell-La Salle Realty Co.*, 283 U. S. 191, 198, "Intention to infringe is not essential under the Act."

In *Shapiro, Bernstein & Co., Inc. v. H. L. Green Company*, 316 F. 2d 304, 308 (2 Cir.), wherein counsel for *amicus curiae* herein was counsel for plaintiffs, the Court said that "Courts have consistently refused to honor the defense of absence of knowledge or intention." The Court, likewise, said (p. 309), "Indeed, the record in this case reveals that the 'bootleg' recordings were somewhat suspicious on their face; they bore no name of any manufacturer upon the labels or on the record jackets, as is customary in the trade," which is pertinent to the facts in the instant case.

In *Shapiro, Bernstein & Co., Inc. v. Goody*, 248 F. 2d 260, 261, 264 (2 Cir.), cert. den. 355 U. S. 952, wherein counsel for *amicus curiae* herein was likewise counsel for plaintiffs, the Court said, "On both disk and jacket the customary disclosure of the manufacturer was absent except for the cryptic reference to 'A.F.N.' . . . When dealing with unknown manufacturers the burden on the purchaser for resale to exercise caution is no greater than that required of the buyer of any merchandise which might infringe", citing *F. W. Woolworth Co. v. Contemporary Art*, 344 U. S. 228.

In *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F. 2d 282, 283 (8 Cir.), the Court said, citing and following *Buck v. Jewell-La Salle Realty Co.*, *supra*, "Nor is an intention to infringe the copyright essential under the Copyright Act".

In the very case of *Malsed v. Marshall Field & Co.*, 96 F. Supp. 372, cited by the District Court herein (243 F. Supp. 999, 1000), the court said (p. 375), citing and following *Buck v. Jewell-La Salle Realty Co.* and *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, *supra*, "For infringement lies in the act of infringing, and not in the intention with which it is done."

To the same effect:

De Acosta v. Brown, 146 F. 2d 408, 410, 411 (2 Cir.), cert. den. 352 U. S. 862.

II

The District Court having concluded that defendant infringed the respective copyrights in plaintiff's songs and that there was no proof of damages the Court was bound by the \$250 statutory minimum for each infringement.

In *Westermann Co. v. Dispatch Co.*, 249 U. S. 101, 102, one of the questions for consideration was "whether the damages should have been assessed at not less than \$250 for each case".

The Court held (p. 106) "that in every case the assessment must be within the prescribed limitations". The Court quoted (p. 108) from *Brady v. Daly*, 175 U. S. 148, wherein the court said, "In the face of the difficulty of determining the amount of such damages in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made". The Court then said (p. 109): "It was after the minimum limitation was thus recognized as of controlling force in the assessment of the damages that the terms of the provision then under consideration were substantially

repeated in the 'in lieu' provision of the revised act. This hardly would have been done had it not been intended that the limitation should be as controlling there as in the earlier statute''.

In accord therewith, the Court determined (p. 109) that "the District Court erred in awarding less than \$250 damages in each of the seven cases".

In *Fred Fisher, Inc. v. Dillingham*, 298 Fed. 145, 152 (S.D.N.Y., L. Hand, D. J.), wherein counsel for *amicus curiae* herein was counsel for plaintiff, cited in *Jewell-La Salle Realty Co. v. Buck*, *infra* (p. 205), the court said that "section 25 (Comp. St. § 9546) fixes a minimum of \$250, which is absolute in all cases. Since *Westermann Co. v. Dispatch Co.*, 249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499, any doubts reserved in *Hendricks Co. v. Thomas Pub. Co.*, 242 Fed. 37, 154 C.C.A. 629 (CCA 2), are laid. Therefore I must and do award that sum as damages."

In *Jewell-La Salle Realty Co. v. Buck*, 283 U. S. 202, 203, "Question II", certified by the Court of Appeals was "In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of \$250 set out in the so-called 'no other case' clause by Section 25(b) of the Copyright Act (17 U.S.C., Sec. 25), reading 'and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty?' "

The Court determined (p. 207) that "The definite specification of a maximum and minimum in every case is not contradicted in any way by these legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations. See *Westermann v. Dispatch Printing Co.*, 249 U. S. 100, 106, 109. If, as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress. Question II is answered in the affirmative".

In *Douglas v. Cunningham*, 294 U. S. 207, 209, the Court in referring to former § 25(b) said:

“The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory. In many cases plaintiffs, through proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged wilful and deliberate infringement.”

The Court, in accord with its prior determination in *Westermann Co. v. Dispatch Printing Co. and Jewell-LaSalle Realty Co. v. Buck*, *supra*, held (p. 210):

“This court has twice construed § 25 (b) in the light of its history and purpose. *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100; *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202. As shown by those decisions, the purpose of the act is not doubtful. The trial judge may allow such damages as he deems to be just and may, in the case of an infringement such as is here shown, in his discretion, use as the measure of damages one dollar for each copy,—Congress declaring, however, that just damages, even for the circulation of a single copy, cannot be less than \$250, and no matter how many copies are made, cannot be more than \$5000. In the *Westermann* and *LaSalle* cases it was held that not less than \$250 could be awarded for a single publication or performance. It follows that such an award, in the contemplation of the statute, is just.”

In the instant case, the District Court in misconstruing *Douglas v. Cunningham*, *supra*, concluded directly to the contrary, that the "in lieu" provision was only applicable in "cases which presented impossibility of proof" as to both "damages and profits", and accordingly that in the absence of proof of actual damages "proof of profits" will obviate the necessity for resort to the "in lieu" provision (C. 4, 5).

Buck v. Bilkie, 63 F. 2d 447 (9 Cir. 1933), was "an appeal by plaintiffs from so much of a decree enjoining further violation of their copyright in a musical composition as denied to them any damages or attorney's fees". This Court in citing and following *Jewell-La Salle Realty Co. v. Buck*, *supra*, specifically held, in accord with the prior uniform determination of the Supreme Court, that "In the absence of proof of actual damages, an award of at least \$250 damages is mandatory. *Jewell-La Salle Realty Co. v. Buck*, 283 U. S. 202, 51 S. Ct. 407, 75 L. Ed. 978, construing 17 U.S.C. § 25(b), 17 U.S.C.A. § 25(b) the Copyright Act § 25(b)". Accordingly, the decree of the District Court was "modified by adding thereto an award of the statutory minimum of \$250 damages, in addition to the costs".

The following subsequent determinations of District Courts in this Circuit, are in accord with the foregoing determination of this Court.

Doll v. Libin, 17 F. Supp. 546, 548 (D. Montana, 1936);

Towle v. Ross, 32 F. Supp. 125, 128 (D. Oregon, 1949).

The determination of the Court of Appeals, Eighth Circuit, has been uniformly in accord with the foregoing determination of this Court.

The leading case is *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F. 2d 282, 283 (8 Cir.), cited *supra*, wherein the court said:

“Finally appellants contend that plaintiff’s recovery should have been limited to the amount of the actual profit made on the transaction by the defendants. In answer to an interrogatory propounded by plaintiff the defendants stated their total net profit to have been \$5.10. It is their claim that the court was limited by the statute to assessing damages in that sum.”

* * * * *

“No proof of actual damages was offered or received on the trial, and the court made no finding on that subject. Under these circumstances it is well settled that the discretion of the trial court in assessing statutory damages instead of actual damages is not reviewable. *Douglas v. Cunningham*, 294 U. S. 207, 55 S. Ct. 365, 79 L. Ed. 862. And in the absence of proof of both actual damages and profits the trial court is required to award the minimum statutory sum of \$250. *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499; *Jewell-La Salle Realty Co. v. Buck*, 283 U. S. 202, 51 S. Ct. 407, 75 L. Ed. 978; *Douglas v. Cunningham*, *supra*.”

In *Interstate Hotel Co. v. Remick Music Corp.*, 157 F. 2d 744, 749 (8 Cir), cert. den. 329 U. S. 809, the court said to the same effect, citing and following its prior determination in *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, *supra*:

“The other assignment is that the court committed error in entering a judgment in favor of each appellee for \$250 for each infringement committed by appellants. The judgments were for the minimum amount permitted by the Copyright Act in cases of

infringement where actual damages were not established. *Buck v. Jewell-LaSalle Realty Co.*, *supra*; *Johns & Johns Printing Co. v. Paull-Pioneer Music Corporation*, 8 Cir., 102 F. 2d 282.”

In *Advertisers Exchange v. Hinkley*, 199 F. 2d 313, 315, 316 (8 Cir.), cert. den. 344 U. S. 921, the court said to the same effect, after quoting the pertinent part of its prior determination in *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, *supra*:

“The ‘in lieu’ provision of the statute is not to accomplish the imposition of a penalty as has been assayed here, but is an ‘equitable substitute for cases which present difficulty or impossibility of proof as to damages and profits’. *Malsed v. Marshall Field Co.*, D. C., 96 F. Supp. 372, loc. cit. 377.”

In *Wihtol v. Crow*, 309 F. 2d 777, 780, 783 (8 Cir.), the action had likewise been dismissed on the merits and defendants awarded an attorney’s fee, because of the alleged wrongful procedure of plaintiffs in endeavoring to induce defendants to comply with their purportedly unjust demands. The appellate court, in reversing and remanding the case for further proceedings in accord with its opinion, said:

“Damages, within the statutory limits, must be allowed by the trial court, which must also determine the question of whether any attorneys’ fees shall be added to costs.”

To the same effect:

Universal Statuary Corporation v. Gaines, 310 F. 2d 647, 648 (5 Cir.):

“The appeal is from that part of the final judgment limiting the amount of damages to \$250, appellant contending that the District court erred in failing and

refusing to award damages in an amount not less than \$250 nor more than \$5,000 for each of the thirteen separate and distinct copyrights which the court found to be infringed. The appeal is meritorious. The governing statute is clear.

“The Supreme Court has so held in a multiple-copyright infringement case, *L. A. Westermann Company v. Dispatch Printing Company*, 1919, 249 U. S. 100, 73 S. Ct. 225, 97 L. Ed. 280, and has also held that the discretion of the trial court in assessing such damages as appear just is limited by the statutory minimum of \$250 and maximum of \$5,000. *Westermann, supra*; *Jewell-LaSalle Realty Company v. Buck*, 1931, 283 U. S. 202, 73 S. Ct. 226, 97 L. Ed. 281; *Douglas v. Cunningham*, 1935, 294 U. S. 207, 73 S. Ct. 224, 97 L. Ed. 280; and *F. W. Woolworth Company v. Contemporary Arts, Inc.*, 1952, 344 U. S. 228, 73 S. Ct. 222, 97 L. Ed. 276.”

The District Court herein concluded that if “Either profits or damages are ascertainable, the minimum provided for in the ‘in lieu’ provision need not be resorted to”, citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S. 390 (R. 232, par. 4). That case has no possible application. The Court said that the District Court had “confirmed with slight modifications the report of a special master which awarded to petitioners all the net profits made by respondents from the exhibitions of the motion picture, amounting to \$587,604.37 . . . The Circuit Court of Appeals reversed, holding that there should be an apportionment and fixing petitioners’ share of the net profits at one-fifth . . . In view of the importance of the question, which appears to be one of first impression in the application of the copyright law, we granted certiorari” (pp. 396, 397). Accordingly, the \$250 statutory minimum had no application, the only question being one of apportionment.

The District Court herein concluded that "It is a matter of judicial discretion as to whether or not it is more just that recovery be based upon proven profits of the defendant and damages to the plaintiff, or within the statutory limits", citing *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U. S. 228 (R. 233, par. 6). That case has no application as the profits were in excess of the statutory minimum. The sole question was, if the profits are in excess of the statutory minimum, does the court have discretion to award a larger sum not in excess of the statutory maximum. In this respect the Court said (pp. 231, 233):

"Petitioner's contention here is that the statute was misapplied because its own gross profit of \$899.16 supplied an actual figure which became the exclusive measure of its liability. It argues that an infringing defendant, by coming forward with an undisputed admission of its own profit from the infringement, can tie the hands of the court and limit recovery to that amount. We cannot agree."

* * * * *

"If we sustain petitioner's contention that profits may be the sole measure of liability as matter of law, such profits could be diminished even to the vanishing point."

* * * * *

"Moreover, a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct."

Likewise, the interpretation by the Court of its prior determination in *Sheldon v. Metro-Goldwyn Pictures Corp.*, is

at complete variance with that of the District Court herein (referred to *supra*), the Court saying with respect thereto (p. 234) :

“Petitioner cites *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 399, where this Court said that the ‘in lieu’ clause ‘is not applicable here, as the profits have been proved and the only question is as to their apportionment,’ a statement on which petitioner leans almost its whole weight. There net profits from exhibition of an infringing picture were found to be \$587,604.37. . . . The Court of Appeals cut the award of these actual profits to one-fifth thereof, upon the ground that success of the picture had been largely due to factors not contributed by the infringement. The propriety of this reduction was the sole issue before this Court.”

As the court said in *Amsterdam Syndicate v. Fuller*, 154 F. 2d 342, 343 (8 Cir.) :

“The fact that the demand of the plaintiffs appears in this case to be harsh and unreasonable can make no difference. The ‘in lieu’ provisions of the statute under which the action is brought are, in contemplation of law, ‘just,’ *Douglas v. Cunningham*, 294 U. S. 207, 55 S. Ct. 365, 79 L. Ed. 862; and if in fact the awards compelled by the statute are ‘unjust’ and unreasonable ‘the remedy lies with congress,’ and not with the courts. *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202, 51 S. Ct. 407, 75 L. Ed. 978. See, also, *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499; *Buck v. Jewell-LaSalle Realty Co.*, 8 Cir., 51 F. 2d 730; and *Johns & Johns Printing Co. v. Paull-Pioneer Music Corporation*, 8 Cir., 102 F. 2d 282.”

All of the cases cited and followed therein are cited *supra*.

CONCLUSION

It is therefore respectfully submitted that the judgment should be reversed and that the plaintiff-appellant should recover the statutory minimum of \$250, for the infringement of each of its twelve musical compositions.

Respectfully submitted,

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Protective Association, Inc.,
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APPENDIX A

§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) . . . to arrange or adapt it if it be a musical work.

APPENDIX B

§ 101. INFRINGEMENT.—If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) INJUNCTION.—To an injunction restraining such infringement;

(b) DAMAGES AND PROFITS; AMOUNT; OTHER REMEDIES.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

HOWARD C. HAYES, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIEF FOR THE APPELLANT

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FEB 10 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20374

UNITED STATES OF AMERICA,

Appellant

v.

HOWARD C. HAYES, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

The United States brought this action in the United States District Court for the District of Alaska, seeking to recover \$30,691.67, plus accrued interest, from the guarantors of a loan made by the Reconstruction Finance Corporation to two corporations which defaulted on their note. Jurisdiction of the district court was founded on 28 U.S.C. 1345. After trial, the district court entered judgment dismissing the action with prejudice. The jurisdiction of this Court on appeal rests upon 28 U.S.C. 1291.

This is an action brought by the United States against the guarantors of a note payable to the Small Business Administration as assignee of the Reconstruction Finance Corporation.^{1/} The note was executed in the principal amount of \$49,200, by Hayes and Whiteley Enterprises, a co-partnership consisting of Chichago Corporation and Gastineau Corporation, and interest was payable at the annual rate of 5 per cent (R. 4, 17-18). The note was secured by a first mortgage upon timber land and chattels owned by Hayes and Whiteley Enterprises. The principal officers of the two Corporations, Messrs. Howard C. Hayes and Stanwood P. Whiteley and their wives, "unconditionally" guaranteed to R.F.C. "the due and punctual payment when due, whether by acceleration or otherwise... of the principal of and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor" (R. 4, 17-18).

Soon after the loan was made, Hayes and Whiteley Enterprises became insolvent, and later bankrupt, and was placed in the hands of a trustee (Tr. 17). It also defaulted on the R.F.C. note (R. 18). Small Business Administration brought suit, and in April 1958 obtained a judgment totalling (principal, interest,

^{1/} The functions of the Reconstruction Finance Corporation were transferred to the Small Business Administration by 1957 Reorganization Plan No. 1, effective June 30, 1957, 22 Fed. Reg. 633, 71 Stat. 647.

and other various sums) \$48,983.72, and a foreclosure decree (R. 18, Exh. F).^{2/}

The guarantors of the loan were not joined as defendants in that suit. The Trustee was served with process, entered a general appearance, admitted service of process and filed a waiver of time for further pleading and trial. The two corporations comprising Hayes and Whiteley Enterprises were served separately, and defaulted (Exh. F). Mr. Hayes stated that he had knowledge of these proceedings in the bankruptcy court (Tr. 25). However, neither he nor Mr. Whiteley undertook to defend the suit in the bankruptcy court.^{3/} Pursuant to the foreclosure decree, the property owned by Hayes and Whiteley was sold. During the time that the property had been under the control of the Trustee, it had depreciated in value, through vandalism and theft, and the property did not satisfy the judgment in full. On June 30, 1958, the United States Marshal filed in court a Return on Execution recording that the judgment in favor of Small Business Administration was unsatisfied in the sum of \$30,691.67 (Exh. E).

In August 1962, a second suit was brought by the United States against the guarantors of the note in the United States

^{2/} The judgment also provided that interest was to run until the judgment was paid (Exh. F).

^{3/} Mr. Whiteley claimed that he did not bid at the foreclosure sale, because he had been led to understand by an R.F.C. employee that he would not be held liable on his guarantee (Tr. 30). He did not, and could not, suggest that there would have been any defense to the foreclosure suit itself.

District Court for the District of Alaska. The Complaint averred that the judgment in the suit on the note remained unpaid in the amount of \$30,691.67, plus accrued interest in the amount of \$7,811.00. The Complaint asked for judgment in the amount of the principal and accrued interest, with additional interest to run from the date of the filing of the suit (R. 3). The guarantors' Answer admitted the execution of the Note by Hayes and Whiteley Enterprises and the unconditional Guarantee, and that Hayes and Whiteley Enterprises had defaulted on the note and a judgment had been obtained by Small Business Administration (R. 4). The Answer, however, generally denied the allegation in the Complaint that the judgment remained unpaid in amount of \$30,691.67 plus interest. The guarantors did not allege that the judgment had been paid, and indeed admitted that they had paid no part of it (R. 5, 10).

At the trial, the Government urged that the judgment against Hayes and Whiteley Enterprises was prima facie evidence of the liability of the guarantors (Mr. and Mrs. Hayes and Mr. and Mrs. Whiteley), and also sought to show the amount owing on the judgment by introducing a Statement of Account certified "to be a true and accurate statement of account as reflected by the official records maintained in the Office of Fiscal Operations" of the Small Business Administration, by the Head of the Loan Accounting Branch of that agency. The district court refused to admit the Statement of Account into evidence, reasoning that

It was not a record of any act, transaction, occurrence, or event, so as to be admissible under 28 U.S.C. 1732, and that it was not properly authenticated so as to be admissible as a government record under 28 U.S.C. 1733 (Tr. 6-7).

The Government then attempted to have an S.B.A. official who was in the courtroom testify and authenticate a revised Statement of Account. The district judge also excluded this testimony, on the ground that at the pre-trial conference the United States had stated that it would call no witness, and would not be permitted to go beyond the scope of the pre-trial order (R. 20-21), even to the extent of calling a witness simply for the purpose of authenticating a document (Tr. 8-11).

The district court ruled that the burden of proving the amount payable was on the United States, because "evidence of the amount of payment on the note guaranteed by the defendants and on the judgment secured by plaintiff's predecessor on said note was chiefly or entirely within the control of the plaintiff" (R. 33). The court then found that "plaintiff failed to sustain the burden of proof as to the amount due on the indebtedness guaranteed by the defendants," and entered judgment dismissing the action.

SPECIFICATION OF ERRORS

1. The district court erred in ruling that under the facts and circumstances of this case, the United States had the burden

of proving the amount due on the judgment obtained on the indebtedness guaranteed by the defendants.

2. The district court erred in "finding" that evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States.

SUMMARY OF ARGUMENT

This case turns upon whether a noteholder who has obtained judgment against his principal debtor must, in a subsequent suit against guarantors of the note who were not party to the first suit, sustain the burden of proving the amount of the still unpaid judgment. We submit that the district court committed plainly reversible error in holding, in this case, that there was such a burden on the United States.

First, the district court erred in ruling that such a burden must be imposed on the United States because evidence of payment "was chiefly or entirely within the control" of the United States. Of course, as the district court noted, a party with principal knowledge of a fact must bear the burden of proving its existence or non-existence. 9 Wigmore on Evidence 2486 (3d Ed. 1940). But here evidence of whether the judgment against Hayes and Whiteley Enterprises had been paid was just as easily accessible to Mr. and Mrs. Hayes and Mr. and Mrs. Whiteley as it was to the United States. Presumably the judgment could have been paid by the defendants, or by the Trustee of their bankrupt corporations. Defendants admit that they

made no payments on the judgment (R. 5, 10). It was also just as easy for them to discover what payments, if any, the Trustee of their own corporations had made as it was for the United States. All that was required of them was to look at the file of the Bankruptcy court, or to correspond with the Trustee.

Second, it is almost universally held that a judgment obtained in a suit against a principal debtor is prima facie evidence of the liability of his guarantor or surety in a subsequent suit. E.g., Moses v. United States, 166 U.S. 571, 600; Lake County v. Massachusetts Bonding & Ins. Co., 75 F. 2d 6, 8 (C.A. 5), followed, 84 F. 2d 115 (C.A. 5); Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc., 92 F. 2d 657 (C.A. 3); Commonwealth to the Use of Ulshofer v. Turner, 340 Pa. 468, 17 A. 2d 352, 354 (1941).

It is particularly appropriate that this rule be applied in this case, where the guarantors are the principal officers (and their wives) of the corporations against whom the judgment was entered in the first suit, cf. Empire Steel Co. of Texas v. Omni Steel Corp., 378 S.W. 2d 905, 911-12 (Tex.Civ.App. 1964) (writ ref. n.r.e.), and where the guarantors were aware of the foreclosure proceedings (Tr. 25) brought against their own corporation.

Third, it is well-settled that "a judgment is presumed to remain in force until the contrary appears." Daniel Drug Co. v. Collier Drug Co., 207 Ala. 308, 92 So. 895 (1922). In the

...of prior to the contrary, it is assumed that judgments re-
n unpaid, and, as a general rule, the burden of proving payment
a judgment rests squarely upon the defendant. E.g., Swartz v.
ayton, 325 Mass. 747, 92 N.E. 2d 263 (1950).

Inasmuch as a) the judgment against Hayes and Whiteley Enter-
ses is prima facie evidence of the liability of Mr. and Mrs.
es and Mr. and Mrs. Whiteley, the guarantors, and b) that
gment is presumed to remain unpaid until the defendant guaran-
s show otherwise, there is no doubt that the district erred in
ding that the United States had the burden of making a negative
wing that the judgment in favor of the Small Business Admini-
ation had not been paid. Although the defendants were free to
er proof of payment of the judgment, they did not (and, of
rse, could not) attempt to do so. It follows that the district
rt had no legal basis on which to absolve the guarantors of
ir plain contractual obligation, freely undertaken, and should
e entered judgment for the United States. Compare United State
Buffalo Coal Mining Co., 343 F. 2d 561 (C.A. 9), rehearing
ied, 345 F. 2d 517.

The district court correctly rejected several affirmative de-
ses raised by appellees. Defendants' contention that the suit
barred by laches or by the Alaska Statute of Limitations was
perly rejected on the basis of United States v. Summerlin, 310
. 414, 416; see also United States v. 93 Court Corp., 350 F. 2d
(C.A. 2). Defendants also claimed that the property involved
depreciated in value because of the wilful failure of R.F.C.
care for it. The district court, however, found (R. 32) that
e proof fails to establish that RFC was in possession or con-
l of the property or had a duty to protect and preserve it"
yes and Whiteley Enterprises was placed into receivership at
request of a private creditor, not RFC Tr. 24) and that "There
no evidence of a willful act or willful failure to act on the
t of RFC causing deterioration, waste or loss of the property."
ally, defendants claimed that an RFC employee, Mr. Hugo Guenthe,
icated to them that they would not be held liable on their
rantees. The district court found (R. 32) that "The proof fail
establish the Hugh (sic) Guenther had authority to orally re-
se defendants from the guaranty or that he did so."

THE DISTRICT COURT ERRED IN PLACING THE BURDEN OF PROVING THE AMOUNT DUE ON A JUDGMENT ON THE UNITED STATES, THE PLAINTIFF IN THIS ACTION AGAINST THE GUARANTORS OF THE NOTE ON WHICH THE JUDGMENT WAS OBTAINED.

As earlier stated, this case turns on whether the United States had the burden of proving the amount due on a judgment against Hayes and Whiteley Enterprises in a subsequent suit against the guarantors of the note, Messrs. Hayes and Whiteley, and their wives. Without attempting to rule on the question of whether a judgment obtained against a debtor is prima facie evidence of the liability of the guarantors, the district court held that the United States had the burden of proving non-payment of the judgment, because, it thought, evidence of payment or non-payment was "chiefly or entirely within the control" of the United States. As demonstrated below, the basis for the district court's conclusion is unsound, and a judgment against a principal debtor in circumstances such as these is prima facie evidence of his unpaid debt in a later suit against his guarantor.

A. EVIDENCE OF WHAT PAYMENTS WERE MADE ON THE JUDGMENT WAS NOT CHIEFLY OR ENTIRELY WITHIN THE CONTROL OF THE UNITED STATES.

The district court's findings of fact and conclusions of law do not indicate why it thought that evidence of what payments were made on the judgment against Hayes and Whiteley Enterprises was peculiarly within the control of the United States. It is

true that a party having peculiar knowledge of a fact often is held to have the burden of proving its existence or non-existence,^{5/} but it is perfectly clear here that evidence of what payments had been made on the judgment was just as easily accessible to the defendant guarantors as it was to the United States. All defendants had to do was to look at the files of the Bankruptcy court (another division of the United States District Court for the District of Alaska),^{6/} or to correspond with the trustee of their own corporations. The Trustee has a statutory obligation to "keep records and accounts showing all amounts and items of property received and from what sources, all amounts expended and for what purposes and all items of property disposed of." 11 U.S.C. 75(a)(5). He also must furnish all such information to any party in interest who requests it. 11 U.S.C. 75(a)(10). Thus the bankruptcy file, which was just as accessible to defendants as to the United States, contained all the necessary information respecting payment of the judgment in question.

In addition, even were it assumed that the United States somehow had easier access to information of this nature than defendants, defendants could obtain the information with minimal

^{5/} E.g., Erving Paper Mills v. Hudson-Sharp Machine Co., 332 F. 2d 674, 678 (C.A. 7); Fleming v. Ashbaugh, 158 F. 2d 826, 828 (C.A. 9); 9 Wigmore on Evidence § 2486 (3d Ed. 1940).

^{6/} Indeed, it would have been proper for the district court to take judicial notice of such files. See Freshman v. Atkins, 69 U.S. 121, 124; Cf. Lowe v. McDonald, 221 F. 2d 228, 230-31 (C.A. 9).

difficulty through discovery procedures. Defendants recognized this, and filed interrogatories asking the United States to state what payments had been made, and the dates of payment (R. 6-7). The answers to the interrogatories, of course, revealed that the only payments on the note after the judgment was entered in April 1958 consisted of one small payment by the Trustee, plus the proceeds of the foreclosure sale (R. 8-9).

Defendants cannot both use the discovery procedures set forth in the Federal Rules of Civil Procedure to receive simple information and at the same time claim that the burden of proving the existence of such information lies upon the United States because it has peculiar knowledge of the facts. The doctrine relied upon by the district court is not applicable to alter the usual burden of proving simple facts as easily discoverable as those involved here. Tortora v. General Motors Corp., 373 Mich. 563, 130 N.W. 2d 21, 24 (1964).

B. THE JUDGMENT OBTAINED AGAINST THE PRINCIPAL DEBTOR, HAYES AND WHITELEY ENTERPRISES, IS PRIMA FACIE EVIDENCE OF ITS LIABILITY IN A SUBSEQUENT ACTION AGAINST ITS UNCONDITIONAL GUARANTORS.

The great majority of jurisdictions passing on the question have held that a judgment obtained against a principal debtor is prima facie evidence of his liability in a suit against his guarantor or surety. E.g., Moses v. United States, 166 U.S. 571; Drummond v. Prestman, 12 Wheat. (25 U.S.) 515, 519; Lake County v. Massachusetts Bonding & Ins. Co., 75 F. 2d 6, 8 (C.A. 5), followed 84 F. 2d 115 (C.A. 5); Massachusetts Bonding & Ins. Co. v.

Robert E. Denike, Inc., 92 F. 2d 657, 658 (C.A. 3); Commonwealth v. Turner, 340 Pa. 468, 17 A. 2d 352 (1941); L. B. Price Mercantile Co. v. Redd, 231 S.C. 446, 99 S.E. 2d 57 (1957); Carey v. Maryland Cas. Co., 90 R.I. 430, 158 A. 2d 83, 885 (1960) (dictum); Cf. Stearns, Law of Suretyship (Elder's rev. 1951) § 9.31; contra, United States v. Maryland Cas. Co., 344 F. 2d 912 (C.A. 5) (applying Alabama law).

Indeed, the exact question presented here has been decided by several state courts in circumstances indistinguishable from those present here. In Home Ins. Co. of New York v. Savage, 231 N.Y. App. 569, 103 S.W. 2d 900, 901 (1937), the court set forth the precise issue and its proper resolution (emphasis added):

The next error urged is the ruling that plaintiff might prove the amount of damages due under the bond, by the introduction in evidence of the record default judgment against Savage. No other evidence tending to establish the amount of damages due plaintiff from these two sureties was offered. Defendants claim that in this action plaintiff sought a money judgment against them and should have been required, in this trial, to prove the amount of damages due; and that introduction of the record judgment obtained by default of the principal was not the proper method of proving it. When plaintiff sued the principal and his sureties in this action, and the principal defaulted, the judgment rendered against the principal was admissible in evidence against the sureties to establish the default and fix the measure of damages; and such record is prima facie proof thereof.

Accord: Charleston & W.C.R. Co. v. Robert G. Lassiter & Co., 208 N.C. 209, 179 S.E. 879 (1935); Massachusetts Bond & Ins. Co. v. Central Finance Corp., 124 Colo. 379, 237 P. 2d 1079, 1081 (1951).

A small minority of cases, to be sure, disagree with the rule stated above, and hold that a judgment entered against the principal debtor in a suit in which he has defaulted (rather than a suit the debtor has defended) is not prima facie evidence of his liability in a suit against his guarantors or sureties. Sutter v. Hill, 101 N.E. 2d 502, 504 (Ohio 1950); Monmouth Lumber Co. v. Indemnity Ins. Co., 21 N.J. 439, 122 A. 2d 604 (1956) (acknowledging adherence to the "minority" view); Restatement of the Law, Security §139. For reasons explained below, the majority position is far sounder. In any event, the rationale of the minority (and Restatement) view is completely inapplicable to the present case.

The rationale of the minority position is that a judgment confessed by the debtor is not as probative evidence of his debt as a judgment after a trial in which he contested liability, because an insolvent debtor might not raise meritorious defenses to a suit in which he apparently has no financial stake. However, in the present case the judgment was confessed, not by an insolvent debtor, indifferent to his guarantor's fate, but by a Trustee in bankruptcy required by statute to "examine all proofs of claim and object to the allowance of such claims as may be improper." 11 U.S.C. 75(a)(8); Controller of California v. Lockwood, 193 F. 2d 169, 172 (C.A. 9); 3 Collier on Bankruptcy § 57.17 [2.3]. Presumably the Trustee did not object to this Small Business Administration claim because he found it

erritorious. Thus, the judgment against Hayes and Whiteley Enterprises is probative evidence of its debt, and should be treated as prima facie evidence of that debt in this suit against the guarantors. It should also be remembered that the guarantors in this case are the principal officers and their wives of the debtor corporations. It is hardly unfair to regard the judgment entered against Hayes and Whiteley Enterprises as prima facie evidence of its liability in a later suit against Messrs. Hayes and Whiteley. Cf. Empire Steel Co. of Texas v. Omni Steel Corp., 78 S.W. 2d 905, 911-12 (Tex.Civ.App. 1964) (writ ref. n.r.e.).

Moreover, the majority rule that a judgment against the debtor is prima facie evidence of the guarantors' liability, even if by default, is completely sound and should be followed here, if this Court regards it necessary to choose between the two views. We submit that for two reasons it would be anomalous not to consider a judgment on a note in a suit against the debtor as prima facie evidence of his liability in a subsequent suit against the guarantors. First, if the debtor were to appear as a witness in a suit against his guarantors, and admit that he owed the amount alleged to be due, surely this would be prima facie evidence of his debt, and would support a judgment against the guarantors. His admission of his debt by confessing judgment or defaulting in a suit against him should be accorded at least equal weight. See Drummond v. Prestman, 12 Heat. (25 U.S.) 515, 519.

Second, it should be noted that if instead of first suing the debtor corporations comprising Hayes and Whiteley Enterprises, the United States had brought suit directly against the guarantors, to establish a prima facie case it would have had to do no more than present the note, for "it is an established rule of law that presentation of an instrument [in a suit against a guarantor] is prima facie evidence that the debt therein set forth is unpaid, and the burden of proof is thereupon shifted to the defendant." Lurie v. Newhall, 333 Ill. App. 173, 76 N.W. 2d 813, 815 (1947); accord: Burns v. Cole, 117 Iowa 262, 90 N.W. 731, 732 (1902).^{7/} It is inconceivable that the noteholder would worsen his position by obtaining a judgment against his debtor.

Finally, if the judgment against Hayes and Whiteley Enterprises is prima facie evidence of its liability in the suit against the guarantors, it also is prima facie evidence of the amount of the liability, subject to the affirmative defense of payment. Home Ins. Co. of New York v. Savage, supra, 103 S.W. 2d at 901; Charleston & W.C.R. Co. v. Robert G. Lassiter & Co., supra; Lake County v. Massachusetts Bonding & Ins. Co., supra, 34 F. 2d at 116, n. 2.^{8/} This follows from the well-settled principle that a judgment is presumed to remain in force until

^{7/} The Guaranty expressly states that the "Reconstruction Finance Corporation shall not be required, prior to any such demand on, or payment by, the undersigned [guarantors], to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor..." (R. 4).

^{8/} This is also implicit in Moses v. United States, 166 U.S. 571, 600.

the contrary appears. Daniel Drug Co. v. Collier Drug Co., 207 Ala. 308, 90 So. 895 (1922); C.J.S., Judgments § 559. A defendant against whom a judgment is properly offered in evidence has the burden of proving its payment. Swartz v. Clayton, 325 Mass. 747, 92 N.E. 2d 263 (1950); Bonadonna v. Bonadonna, 322 S.W. 2d 925 (Mo. 1959).

In this case, the defendant guarantors did not attempt to present evidence of payment of the judgment against Hayes and Whiteley Enterprises, nor did they even plead payment. Thus the United States, by introducing the judgment on the note which defendants "unconditionally" guaranteed, established a prima facie case to which no rebuttal was made. It follows that the district court erred in not entering judgment for the United States, in the requested amount.^{9/} Defendants' guaranty is a clear contractual obligation which should be enforced.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the district court should be reversed, with instructions to enter judgment in favor of the United States in the amount of \$30,691.67, plus accrued interest.

Respectfully submitted,

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Walter H. Fleischer

DECEMBER 1965

^{9/} The complaint, of course, does not ask recovery in the full amount of the judgment, \$48,983.72, because the judgment obviously was partially satisfied by the foreclosure sale (Exh. E, R. 8-9).

(footnote continued on page 17)

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

Walter H. Fleischer

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/ (footnote continued from page 16)
This does not relieve defendants of their burden of proving payment; the fact that the United States did part of defendants' work for them by admitting partial payment cannot relieve defendants of the burden of showing what further payments, if any, there were on the judgment.

No. 20374

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Appellant,)
)
vs.)
)
HOWARD C. HAYES,)
STANWOOD P. WHITELEY, et al,)
)
Appellees.)

FEB 10 1957

BRIEF FOR THE APPELLEES

On appeal from the United States District Court for the
District of Alaska

R. BOOCHEVER
of Attorneys for Appellees

FILED
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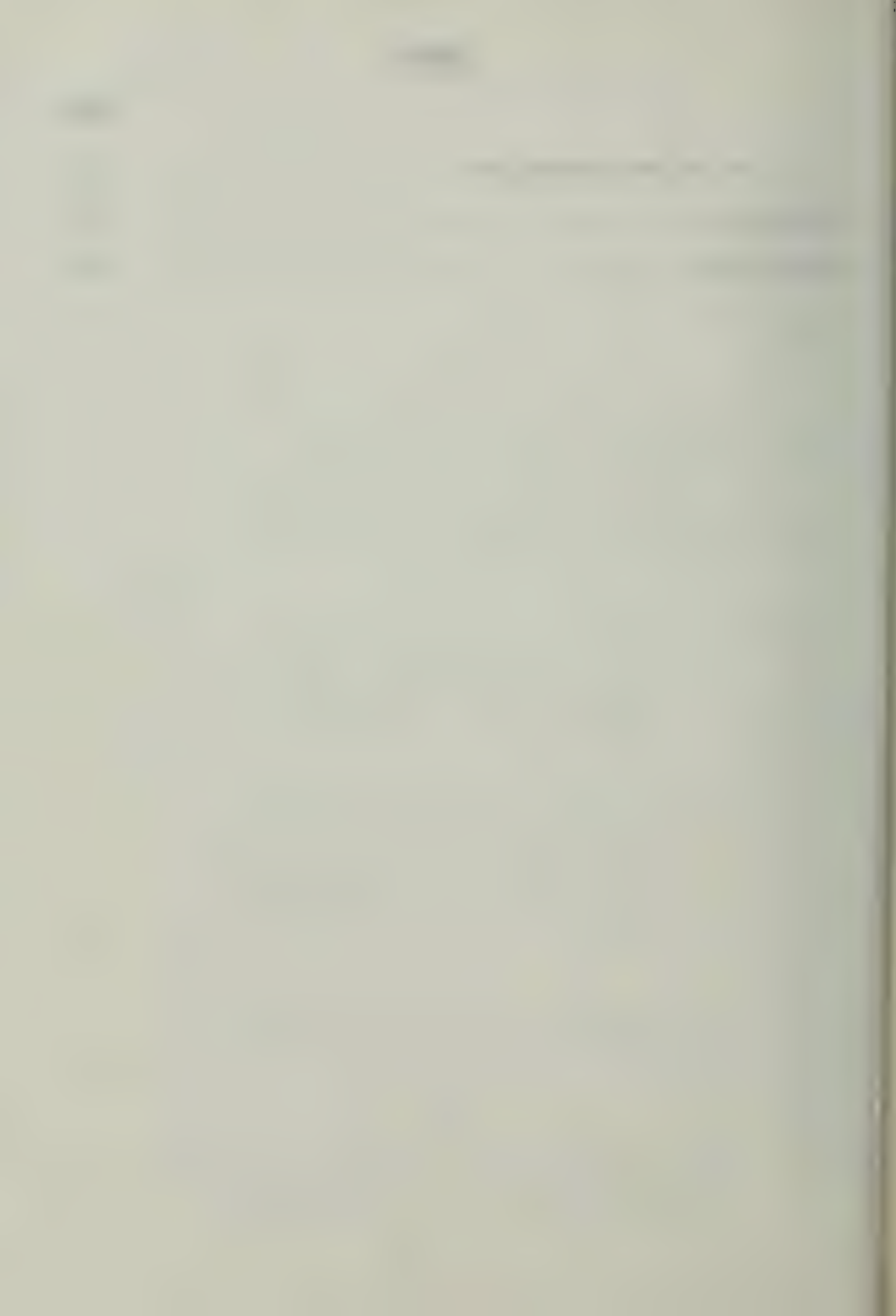
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Appellant,)	
)	
vs.)	
)	
HOWARD C. HAYES,)	
STANWOOD P. WHITELEY, et al,)	
)	
Appellees.)	APPELLEES' BRIEF
<hr/>		

JURISDICTIONAL STATEMENT

Suit was brought in the United States District Court for the District of Alaska, at Juneau, seeking to recover a judgment from the guarantors of a loan made by the Reconstruction Finance Corporation to two corporations. Jurisdiction of the District Court was founded on 28 U.S.C. §1345. The District Court entered judgment dismissing the action with prejudice, on May 3, 1965. Notice of appeal was filed on July 6, 1965, but by affidavits subsequently submitted it appears that filing was made with the Clerk of the District Court in Anchorage, on July 1, 1965. The jurisdiction of this court on appeal rests on 28 U.S.C. §1291.

STATEMENT OF THE CASE

On May 28, 1953, Gastineau Corporation and Chichagof Corporation, a partnership doing business as Hayes & Whiteley

Enterprises, executed a promissory note in the amount of \$49,200 to the Reconstruction Finance Corporation. The maturity of the note was December 15, 1955. Howard C. Hayes, Gladys Hayes, Stanwood P. Whiteley and Margaret Whiteley executed a guarantee of the above-mentioned promissory note on May 28, 1953.

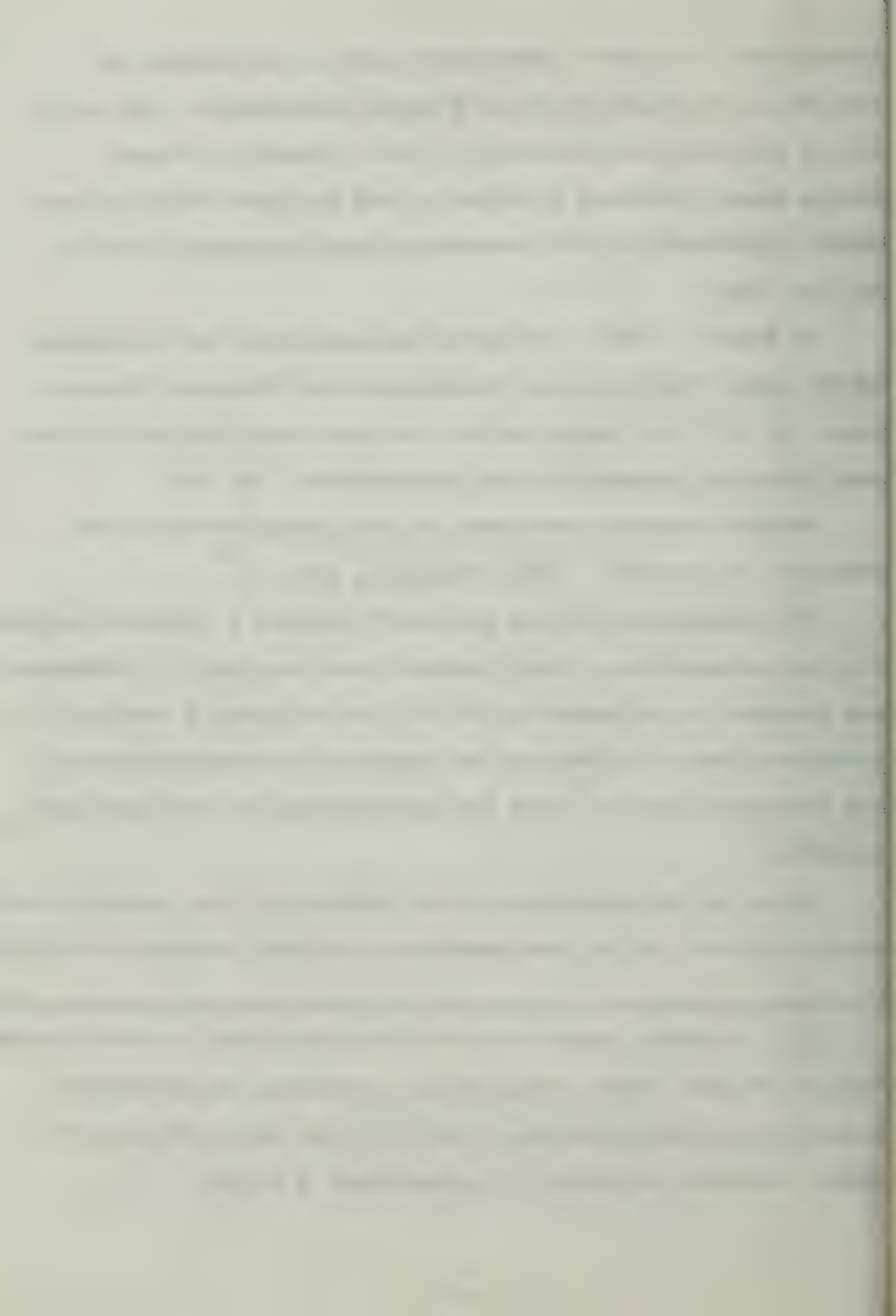
In August, 1954, a receiver was appointed for the makers of the note, the Gastineau Corporation and Chichagof Corporation. (R. 17) Mr. Hayes and Mr. Whiteley were advised to stay away from the property of the corporations. (R. 18)

Various payments were made on the indebtedness by the receiver and trustee. (See Complaint, par. 5)^{1/}

The predecessor of the plaintiff secured a judgment against the two corporations, which judgment was obtained by confession and included an allowance of \$4,000 for attorney's fees and an additional sum of \$4,968.49 for advances and expenditures by the plaintiff for the "care and preservation of the mortgaged property."

Prior to the receivership and bankruptcy, the property was worth \$135,000 (R. 16) and appellees had each invested \$39,000.00

1/ Payments appear also to have been made by other parties such as Tongass Timber Corporation, according to defendants' Answers to Interrogatories, which were not admitted into evidence, although referred to in appellant's brief.



in the corporations.

The property was visited by the appellees at the time that execution sale was contemplated, and they found that almost all of the valuable items were destroyed, damaged or missing. (R. 18, 27)

Appellees assisted the RFC in establishing its lien claim by furnishing an affidavit and were assured by a representative of the RFC in the presence of the attorney who handled the foreclosure for the RFC, that "as long as the property was so badly dissipated, he could see no way they could hold (appellees) personally responsible." (R. 27)

Appellees were not joined in the foreclosure action against the corporations, and as a result of the aforesaid assurance, appellees felt that they were relieved of responsibility and took no further action in the matter. (R. 29)

No suit was ever brought against the appellees by the RFC or by the Administrator of the Small Business Administration, but after the applicable Alaska statute of limitations, §09.10.050 AS, otherwise would have run against the defendants, suit was commenced by the United States in September, 1962, on their guarantees.

Paragraph 5 of the complaint sets forth the amount that appellant considered was unpaid on the note guaranteed by the appellees. This allegation was denied by the appellees in their Second Amended Answer and Affirmative Defense. A pre-

trial conference was held and appellant submitted a pre-trial memorandum stating, in part, "Plaintiff expects to prove the allegations set forth in its complaint which are not admitted by defendant's answer, to wit: Paragraphs 5 and 6."

At the commencement of the trial, the judge stated "... The contested issues of fact and law ... are ... the amount due as principal and interest to date from defendant to plaintiff." (R. 4) Attorney for appellant responded "I think the issues have been covered in the pre-trial memorandum and also in the court's present statement." (R. 5)

The appellant thereupon attempted abortively to prove the amount claimed to be due (R. 6-11) Objection was sustained as to the documentary evidence offered, (R. 7) and as to the testimony of a witness called by appellant. (R. 11) Appellant has not appealed from these rulings of the trial court. (See Specification of Error)

The court below found that certain payments had been made on the judgment obtained by appellant's predecessor (Par. 12, Findings of Fact); that plaintiff indicated its intention to prove the amounts due (Finding 13); unsuccessfully attempted such proof (Finding 15); and that evidence of the amount of payment on the note guaranteed by the appellees and on the judgment secured by plaintiff's predecessor on said note, was chiefly or entirely within the control of the plaintiff. (Finding 16)

The trial court concluded that under the facts and circumstances of this case, plaintiff had the burden of proving the amount due on the indebtedness guaranteed by the defendants and had failed to sustain that burden of proof.

From the judgment dismissing the action this appeal has been taken. ^{2/}

SUMMARY OF ARGUMENT

Appellant contends that the District Court erred in ruling that under the facts and circumstances of this case the United States had the burden of proving the amount due on the judgment obtained on the indebtedness guaranteed by the defendants, and that the District Court erred in finding that the evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States. No proper specification of error has been set forth under the provisions of this court's rule 18 2(d), requiring that "where findings are specified as error the specification shall state as particularly as may be wherein the finding of fact and conclusion of law are alleged to be erroneous."

Appellant devotes but a minimum of space in its brief to arguing these focal points but devotes the weight of its argument to its contention that the judgment obtained against the

^{2/} Appellant in its statement of the case (appellant's brief, p. 3) refers to "a Return on Execution" (Exhibit "E"). This statement is erroneous as the return was merely marked



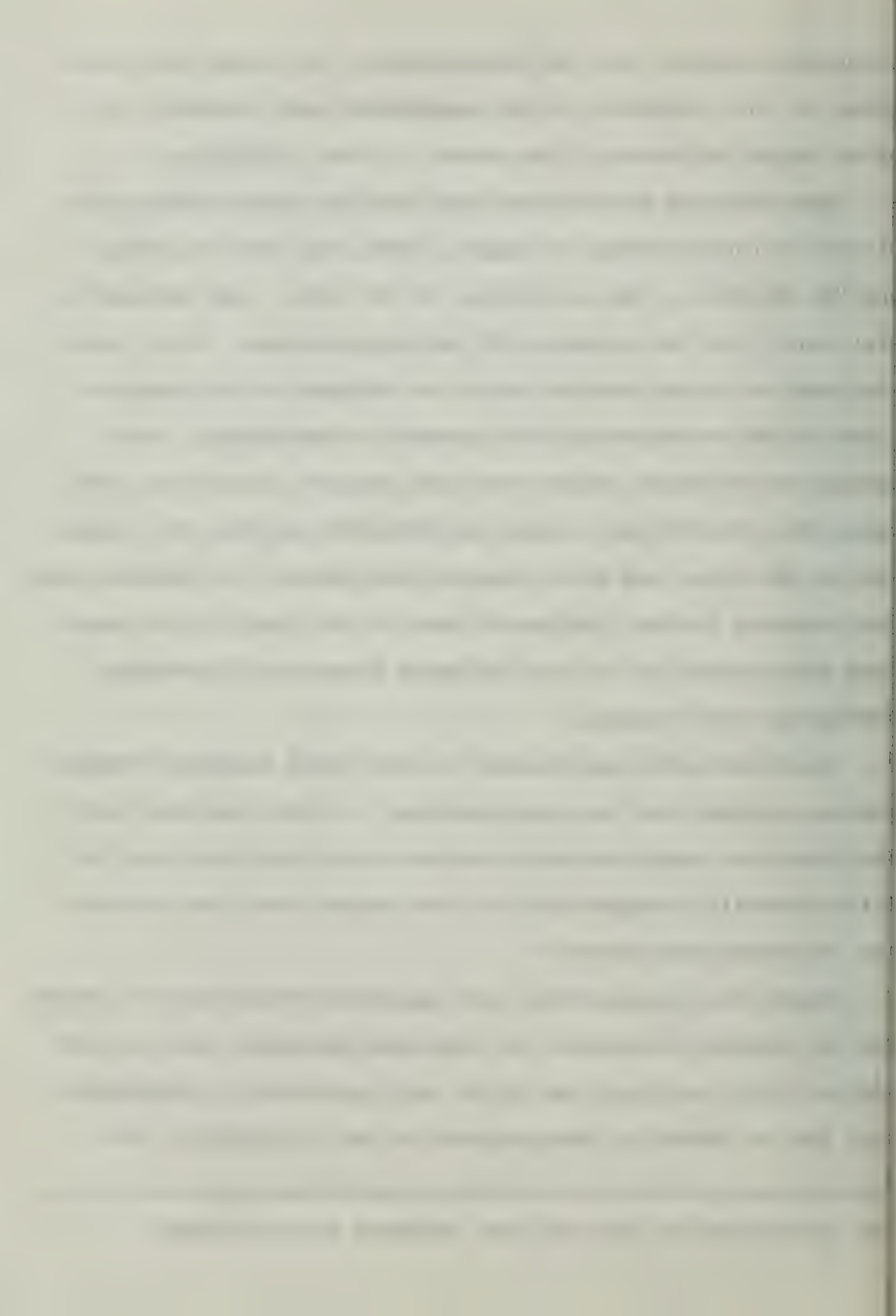
principal debtors, the two corporations, is prima facie evidence of the liability of the guarantors and, further, is prima facie evidence of the amount of that liability.

The evidence established that the two corporations were placed in receivership in August, 1954, and that Mr. Hayes and Mr. Whiteley, the guarantors of the note, were advised to stay away from the property of the corporations. As a result they had no direct contact with the affairs of the corporations which subsequently were placed in bankruptcy. The undisputed evidence showed that the property which was mortgaged for \$49,200 had a value of \$135,000 and that Mr. Hayes and Mr. Whiteley had each invested \$39,000 in the corporations. The evidence further indicated that at the time of the execution sale almost all of the valuable items were destroyed, damaged or were missing.

Suit initially was brought by the Small Business Administration against the two corporations. At the time the suit was filed the appellees were advised that they would not be held personally responsible for the reason that the property was "so badly dissipated."

Since the corporations were insolvent there was no reason for the trustee to oppose the suit and appellees having been advised that they were not to be held personally responsible, also had no reason to participate in the litigation. The

for identification and was not admitted into evidence.



resulting default judgment was for \$48,983.72 including items of \$4,000 for attorney's fee and \$4,968.48 for "care and preservation of the mortgaged property" which had been permitted to have been almost totally dissipated.

The complaint in the subject case against the guarantors was for \$30,691.67, and appellees had no way of proving what payments had been made on the judgment or, for that matter, on the loan itself. Payments were made by other parties than the two corporations and the evidence of payment was obviously chiefly or entirely within the control of the United States. (See footnote 1, p. 2 supra)

Moreover, the case was tried by the United States on the theory that it had the burden of proof as to the amount of payments made. Thus at the pre-trial conference, the United States set forth in its memorandum that it expected to prove the allegations set forth in paragraph 5 of its complaint, which were denied by the appellees. Paragraph 5 set forth the amounts then alleged to be due on the judgment, and these allegations were denied in the answer.

The question of burden of proof with reference to the establishment of payments under these circumstances, is not dependent upon the general law pertaining to the effect of a judgment against a principal debtor in a subsequent action against a guarantor. We know from the pleadings in the subject case that payments had been made on the judgment and the evidence



of the amount of such payments was chiefly or entirely within the control of the United States. Nevertheless, under the circumstances of the subject case the judgment should not be regarded as prima facie evidence of liability of the guarantors or as to the amount of such liability, if any. The guarantors were lulled by the representative of the Small Business Administration and the attorney handling the case into the belief that they would not be held responsible. They thus had no incentive to participate in the action which resulted in a judgment including an allowance of \$4,000.00 for attorney's fee in a default case and approximately \$5,000 for fees for allegedly taking care of the property which had been dissipated. To permit such a judgment to be effective and binding on the parties who had been advised that they would not be held responsible, would be grossly inequitable. This is the type of case for application of the rule set forth in the American Law Institute's "Restatement of the Law", §139(3), holding that "where in an action by a creditor against a principal, judgment is obtained by default or confession against the principal, and the creditor subsequently brings an action against the surety, proof of judgment against the principal is evidence only of the facts of its rendition."

Furthermore, the subject action was commenced more than six years after the last payment had been made by the corporation debtors. If the action were between private parties



the statute of limitations had run so as to warrant judgment for the defendants. When the government through a corporation such as the Reconstruction Finance Corporation, enters into the realm of private business securing itself in the same manner as a private lender there is no reason why the same rules pertaining to limitation of actions should not apply; and the policy considerations in favor of the application of the general commercial rules far outweigh the outmoded decisions under which the sovereign has been held to be exempt from the statute of limitations.

ARGUMENT

I

THE DISTRICT COURT WAS CORRECT IN RULING THAT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE UNITED STATES HAD THE BURDEN OF PROVING THE AMOUNT DUE ON THE JUDGMENT OBTAINED ON THE INDEBTEDNESS GUARANTEED BY THE APPELLEES

From the time of the pre-trial conference in the subject case, the United States undertook to prove the amount due on its judgment. Having failed to sustain this burden of proof at the trial it contended for the first time that the burden of proof should be placed on the appellees. The District Court at the conclusion of the trial requested that briefs be submitted by the parties with reference to the issue pertaining to the burden of proving the amount due on the indebtedness guaranteed by the appellees. After submission of such memoranda and careful consideration thereof, the court found that the

plaintiff had the burden of proving the amount due on the indebtedness guaranteed by the defendants and that the plaintiff failed to sustain the burden of proof.

It is well established that

"Appellate courts ordinarily give findings of fact made by the court in a case tried without a jury the same effect as would be given to findings of fact by a jury, consequently such findings are ordinarily not disturbed on appeal if they are supported by the evidence or at least by substantial evidence, even though there may also have been other conflicting evidence tending against the trial judge's conclusion." (5 Amer. Jur. 2d §839, p. 282)

Counsel admits "that a party having peculiar knowledge of a fact" often is held to have the burden of proving its existence or non-existence. Thus it follows that if the District Court's Finding No. 16 that the evidence of the amount of payment on the note guaranteed by the defendants and on the judgment secured by plaintiff's predecessor on said note was "chiefly or entirely within the control of the plaintiff" is supported by the evidence or substantial evidence, the judgment below should be affirmed.

A. THE RECORD AMPLY SUPPORTS THE COURT'S FINDING THAT EVIDENCE AS TO THE AMOUNT OF PAYMENT WAS CHIEFLY OR ENTIRELY WITHIN THE CONTROL OF THE PLAINTIFF.

Appellees were advised by a representative of the Reconstruction Finance Corporation in the presence of the attorney who handled the foreclosure, that

"so long as the property was so badly dissipated he could see no way they could hold (appellees) personally responsible." (R. 27)

The following is a list of the names of the persons who have been named in the above mentioned documents, in the order in which they are mentioned in the same. The names are given in the original language, and in the English translation, where the same is possible. The names are given in the order in which they are mentioned in the documents, and not in the order in which they are mentioned in the list.

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Appellees were not joined in the foreclosure action and were lulled into the assumption they would not be held personally responsible. From 1954 on appellees had been instructed to stay away from the property of the corporations and aside from visiting the property once shortly before the foreclosure sale, they stayed away. They thus had no means of keeping directly informed of the affairs of the corporations and at the time of the foreclosure suit in 1958, were led to believe that they had no further responsibility so that there was no reason thereafter to follow the matter closely. The answers to interrogatories which were furnished by the government and which are referred to in appellant's brief although not introduced into evidence, show that payments were made by parties other than the two corporations and specifically refer to payments by a Tongass Timber Corporation. The complaint itself seeks recovery for \$30,691.57 together with interest, whereas the judgment obtained on April 5, 1958, totaled \$48,983.72. Appellant in its brief, indicates that there was evidence submitted of the return of execution filed by the United States Marshal (R. 3). This is an erroneous statement as the return was marked for identification and never introduced into evidence. It thus appears from the complaint itself that payments had been made on the judgment. There can be no question but that the appellant had peculiarly within its power the ability to show the exact amount of payments and whether any amounts were due as of the date of trial.



Certainly, appellant was in a far better position to undertake this burden than were the appellees.

Moreover, the judgment obtained in the foreclosure action on April 5, 1958 introduced into evidence subject to objections as to relevancy and materiality as "Exhibit 'C'", provided for foreclosure of the mortgage on real property but did not provide for foreclosure of the chattel mortgage. The mortgage securing the note furnished by the corporations, was a real and chattel mortgage. At the time that the judgment was rendered Alaska provided for summary foreclosure of chattel mortgages. (See 22-6-10, Alaska Compiled Laws Annotated) This factor further emphasizes that the amount of payments received was peculiarly within the knowledge of the appellant.

It is recognized that the general rule is that the appellees in an action on a promissory note who assert that it has been paid in part or in full, has the burden of proving such payments. (See Vol. 8, Amer. Jur., §1035, p. 894)

There are well recognized exceptions to this rule and these exceptions apply with particular cogency to the facts here involved. Thus it is stated at 70 C.J.S., "Payment", §93(b), p. 302:

"In accordance with the general rule that, where the evidence to prove a fact is chiefly, or entirely within the control of one party, it is incumbent on him to produce it, even though he has not the general burden of proof on the issue, as discussed in Evidence §113, it has been held that, where payment is asserted as a defense, but the proof of payment is in the exclusive knowledge



and control of plaintiff, the burden is on him to produce the evidence."

It is further stated therein:

"As against a person other than the debtor, the burden of proving nonpayment of a debt is on the creditor."

This same rule of law is enunciated in 20 Amer. Jur., §139, as follows:

"But when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof be required to adduce it, or, upon his failure to do so, it will be presumed that it does not exist, which of itself establishes a negative."

See also 31A C.J.S., "Evidence" §113.

Under similar circumstances, the United States Supreme Court as well as other jurisdictions consistently have held that the burden of proof lies with the party who is in possession of the proof.

Thus in the case of Selma, Rome & Dalton R.R.Co. vs U.S., (1891) 139 U.S. 560, 35 L. Ed. 266, the railroad sought to recover from the government a certain sum of money which it claimed was due for services of transporting mail during the years just prior to the taking over of the mail service by the Confederacy. An act of Congress permitted payment to the extent that payment had not been made by the Confederacy. The plaintiff contended that the burden of proof was on the United States which alleged that payment had been made, to

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prove the amounts of such payments by the Confederacy. The court refused to place the burden of proof on the party claiming payment, stating at pages 566-578:

"Besides, as the fact of payment or non-payment by the Confederate government was peculiarly within the knowledge of the claimant or within his power--if in the power of anyone--to establish, it may well be supposed that Congress intended that a claimant, as a condition of payment by the United States, should show that his demand belonged to the class for which the Act of 1877 provided. But there was no proof on the subject by the plaintiff, nor does it appear, if that fact were material, that such proof was impossible. It prepared the case and went to a hearing upon the theory that it was entitled to judgment, upon proof simply of the services rendered, unless the United States showed that the claim in suit has been, in fact, paid by the Confederate government. We cannot accept that interpretation of the Act."

In the case of U. S. vs. Denver & R. G. R. Co., 191 U.S. 84, at 92, 48 L. Ed. 106 at 109 (1903) the Supreme Court again stated:

"It is a general rule of evidence, noticed by the elementary writers upon that subject (Greenl. Ev. §79) that 'where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that part.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative."

This general rule of law has been upheld by recent Supreme Court cases. Thus in United States v. New York, N. H. & H. R.R. Co., 355 U. S. 256 (1957), a railroad carrier was paid an earlier bill by the government. When a later bill was submitted the government offset part of the payment of the first bill contending that it had been overcharged on the first bill. The court held that the burden of proof was on the carrier to establish the fairness of its charge, stating:

"The ordinary rule based on questions of fairness does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."

(See footnote 5, 355 U.S. 256.)

The matter again was before the United States Supreme Court in the case of Campbell vs. United States, 365 U. S. 85, 5 L. Ed. 2d 428 (1960). This was a criminal case but the principle of law again was enunciated that

" ... the ordinary rule based on questions of fairness does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of an adversary."

In the case of Schneider vs. Maney, (Mo. 1912) 145 S. W. 823, suit was brought on the basis of three judgments previously obtained on an administrator's bond. There were six sureties on the bond. Judgments were released as to all of the sureties except the defendant Maney who denied that there was the amount due as claimed by the plaintiff. The case thus was in almost identical posture with the subject case involv-

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ing a suit against a surety (in effect a guarantor) based on a prior judgment. The issue was presented as to who had the burden of proof as to the payment. The court held, at page 824, 825:

"Ordinarily payment is an affirmative plea, and the burden of proof is on the defendant; but there are exceptions to that rule, and this is one. Where the proof of payment is in the exclusive knowledge and control of the plaintiff, the burden is on him to produce it. The law is thus stated in 16 Cyc. 936: 'Where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within the control of the adverse party, it has been held that the burden of proof (meaning the burden of evidence) is on the party who knows, or has special opportunity for knowing, the fact, even in criminal cases, although he is obligated to go no farther than necessity requires.' That is the doctrine of this court. Swinhart v. Railway, 207 Mo. 423, 105 S.W. 1043.

"The evidence introduced by the plaintiff shows that five of the six sureties against whom these judgments were rendered have made payments and been released. How much those payments amount to is a fact peculiarly within the knowledge of the plaintiff; but he has seen fit to give no statement thereof, either in his pleading or proof. That is a matter not within the knowledge of the defendant."

In the case of State ex Rel Leary vs. United States, (La. 1938) 185 So. 69, 70, a bank secured judgment against one Parsons. The judgment was assigned to the plaintiff Leary who also secured another judgment against Parsons on which he levied execution. Junior judgment creditors claimed an amount in the sheriff's possession contending that the

prior judgment had been satisfied. The court although recognizing the general rule that the burden of showing payment of a judgment rests upon the party alleging it, held that:

"The Bank, legally, was bound to know what happened, how much was paid it, and what became of the property it caused to be sold, and equitably it, or its assigns, should suffer the consequences for not showing the true facts.

"The burden of proof lies with the party who is the most cognizant of the facts necessary to decide an issue."

In Peterson v. Wilbanks, 163 G. 462, 137 S.E. 69 (1927), a mortgage was foreclosed. A party who had purchased the property for value prior to the foreclosure defended on the ground that the mortgage had been paid. The court held:

"As against a party other than the debtor the burden of proving non-payment of a debt is on the creditor."

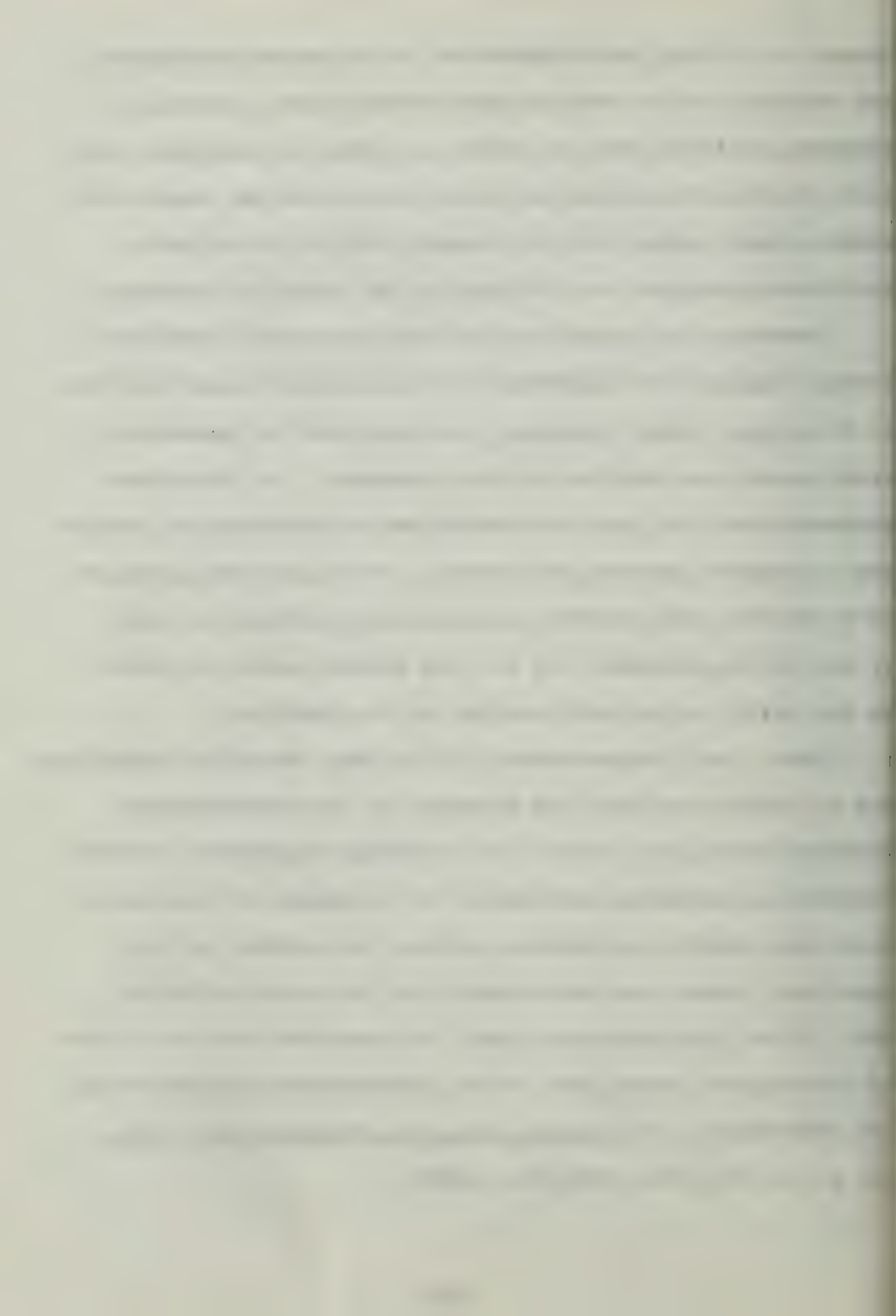
Counsel contends that appellees could have secured information with reference to payments made through the trustee in bankruptcy. This assumes that the trustee would have had further interest in the matter after the foreclosure suit in which he defaulted, for the obvious reason that the corporations were hopelessly insolvent. There is no reason to believe that the bankruptcy file would contain information respecting payment of the judgment in question.

Counsel then attempts to equate the right of discovery with the duty of burden of proof. There are various purposes for exercising rights of discovery but one asking interrogatories is not bound by the answers thereto and the principal

reason for filing interrogatories is to secure admissions and material to be used in cross-examination. Counsel's argument could be used in almost any case to hold that the party holding the burden of proof should not be required to sustain that burden for the reason that the other party could have obtained the information by means of discovery.

Counsel also argues that if suit originally had been brought against the guarantors the government would have had to do no more than to present its note and the burden of proof would have shifted to the defendant. It therefore contends that its position should not be worsened by obtaining a judgment against the debtor. This begs the question as to whether the evidence is peculiarly within the power of one of the parties. If so, the burden would be placed on the party having such control of the evidence.

Under the circumstances of this case where the appellees had no connection with the property or the corporations involved after 1954, where the pleadings themselves reflect substantial payments; and where the evidence of those payments was chiefly or entirely within the control of the appellant, there was ample basis for the court's Finding No. 16 and its conclusion that the appellant had the burden of proving the amount due on the indebtedness guaranteed by the defendants. See G.E.J. Corp. vs. Uranian Aire, Inc., 311 F. 2d 749, 751, (9th Cir. 1963)



B. THE APPELLANT BY ITS CONDUCT IN THE TRIAL BELOW IS ESTOPPED FROM DENYING THAT IT HAD THE BURDEN OF PROOF OR IN THE ALTERNATIVE, HAS WAIVED CONTENTION THAT APPELLEES HAD THE BURDEN OF PROOF.

The rule is set forth in Barron & Holtzoff, "Federal Practice and Procedure", Vol. 1A, p. 844:

"Stipulations and statements of counsel at a pre-trial conference are binding as respects to facts admitted or agreed or defenses waived."

In the case of U. S. v. Fallbrook Public Utility District, 165 F. Supp. 806, a stipulation by the United States Attorney in an action brought to determine water rights, that the United States was claiming no greater rights than a private owner of the land would have, was held to be as binding on the government as it would on a private litigant.

The plaintiff in the subject case having stated that it expected to prove the amount remaining unpaid on its judgment and having abortively attempted to make such proof, cannot be permitted now to contend that the burden of such proof was on the defendant.

The United States in paragraph 5 of its complaint, specified that certain payments were made on the judgment secured by its predecessor against the two corporations. In its pre-trial memorandum the United States stated, in part,

"Plaintiff expects to prove the allegations set forth in its complaint which are not admitted by the defendant's answer, to wit: Paragraph 5 ..."

The government unsuccessfully attempted to introduce

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF THE HISTORY OF ARTS
AND ARCHITECTURE
OFFICE OF THE DEAN
1100 EAST 58TH STREET
CHICAGO, ILLINOIS 60637
TEL: 773-936-5000

Dear Mr. [Name]:

Thank you for your letter of [Date] regarding [Subject].

I am sorry that I cannot provide you with the information you requested at this time. The records you are seeking are currently being reviewed and will be made available as soon as possible.

I have forwarded your request to the appropriate department and will keep you informed of any developments. Your patience is appreciated.

I am sure that you will understand the need for thoroughness in this process. We are committed to providing you with accurate and complete information.

I will contact you again once the information has been processed and is ready for release.

I am very sorry for any inconvenience this may cause and thank you for your understanding.

I am sure that you will find the information helpful and complete.

I am very sorry for any inconvenience this may cause and thank you for your understanding.

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evidence at the trial in proof of the amount due on the judgment and the indebtedness guaranteed by the appellees. In that regard, no appeal has been taken from the ruling of the trial court holding that the evidence attempted to be elicited was inadmissible.

"The trial court has the right during the proceedings of a cause, from its commencement to its final termination, to determine whether the language of a party or his counsel amounts to a waiver or estoppel." (88 C.J.S. §36, p. 96)

Where a case proceeds on the theory that certain facts are not in issue, proof of such facts will be deemed to have been waived.

It is stated at 88 C.J.S. §59, p. 165:

"The necessity of introducing evidence to prove a fact may be waived by the adverse party, although evidence that is relevant cannot be kept from a jury by a waiver of proof if the other party desires the testimony out. An issue may be expressly waived during trial or impliedly waived by the manner in which the trial is conducted. ... Where a case proceeds on the theory that certain facts are not in issue, proof of such facts will be deemed to have been waived. ...

"A party may be estopped to insist on the necessity of his adversary proving a fact. ...

"A party having admitted a fact should not be permitted to introduce evidence to contradict the existence of such fact. ... "

Lafayette Trust Co. vs. Vail, 132 N.Y.S. 86, 147 App. Div. 173.

Accordingly, under the circumstances of the present case where from the pre-trial conference on the case was conducted on the theory that the government had the burden of proving the amount due on the note guaranteed by the appellees and the

judgment obtained against the corporations, the government now is estopped or in the alternative, has waived the right to contend that the burden of proving such amount was on the appellees.

II

THE APPELLANT'S SPECIFICATION OF ERROR NO. 2 IS DEFECTIVE UNDER THIS COURT'S RULES

Appellant's specification of error No. 2, reads:

"The District Court erred 'in finding' that evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States."

Rule 18 2(d) of the United States Court of Appeals Rules for the Ninth Circuit, specifies, in part:

"In all cases when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

As noted above, the specification makes no effort to state wherein it is contended that the finding is erroneous. In the case of Thys vs. Anglo California National Bank, 219 F. 2d 131 (9th Cir. 1955), cert. den. 75 S.C. 875, 349 U. S. 946, 99 L. Ed. 1272, rehearing denied 70 S.C. 40, 350 U. S. 855, the court stated:

"Here, appellants' first specification of error combines alleged errors as to five findings of fact, four conclusions of law, and two distinct questions relating to the admissibility of evidence. The specification does not, as this provision of the Rule requires, 'state as particularly as may be wherein the findings of fact and conclusions of law are alleged to

be erroneous.' Defects in this particular are not remedied by referring the reader to the pages of the brief where the points are argued."

III

UNDER THE CIRCUMSTANCES OF THIS CASE
THE JUDGMENT AGAINST THE CORPORATIONS
WAS NOT PRIMA FACIE EVIDENCE OF
LIABILITY OR OF THE AMOUNT DUE

As pointed out above whether the judgment was prima facie evidence of the amount due is immaterial, under the circumstances of this case where the complaint itself showed that payments had been made on the judgment and the proof of the amount paid was peculiarly within the possession of the appellant. Nevertheless, under the factual context here involved the judgment should not be regarded as any proof of liability of the guarantors. The undisputed testimony was to the effect that the appellees co-operated with the government in establishing its lien claim and were advised that they could not be held personally responsible due to dissipation of the corporations' property. Under these circumstances, the appellees were lulled into ignoring the foreclosure action and the government proceeded to secure a default judgment not only for a substantial sum of money on its note, but, in addition, including a \$4,000.00 attorney's fee and \$4,968.49 allowance for alleged expenditures in caring for the mortgaged property which had been permitted to be almost entirely dissipated.

The rule set forth in American Law Institute's "Re-Statement of the Law", Security, §139(3) appears particularly applicable to this factual situation. It there is stated:

"(3) Where, in an action by a creditor against a principal, judgment is obtained by default or confession against the principal, and the creditor subsequently brings an action against the surety, proof of the judgment against the principal is evidence only of the fact of its rendition." (page 372)

In its comment on this subject at page 375, The Re-Statement states:

"The arguments of policy and convenience against duplication of trials have little weight where there has not been a determination after consideration of evidence introduced by both sides to a litigation. Such a judgment against the principal does not create a rebuttable presumption of the principal's liability, in an action between creditor and surety."

See Sutter v. Hill, 101 N.E. 2d 502, 504, (Ohio, 1950), Mammoth Lumber Co. vs. Indemnity Insurance Company, 21 N.J. 439, 122 A. 2d 604.

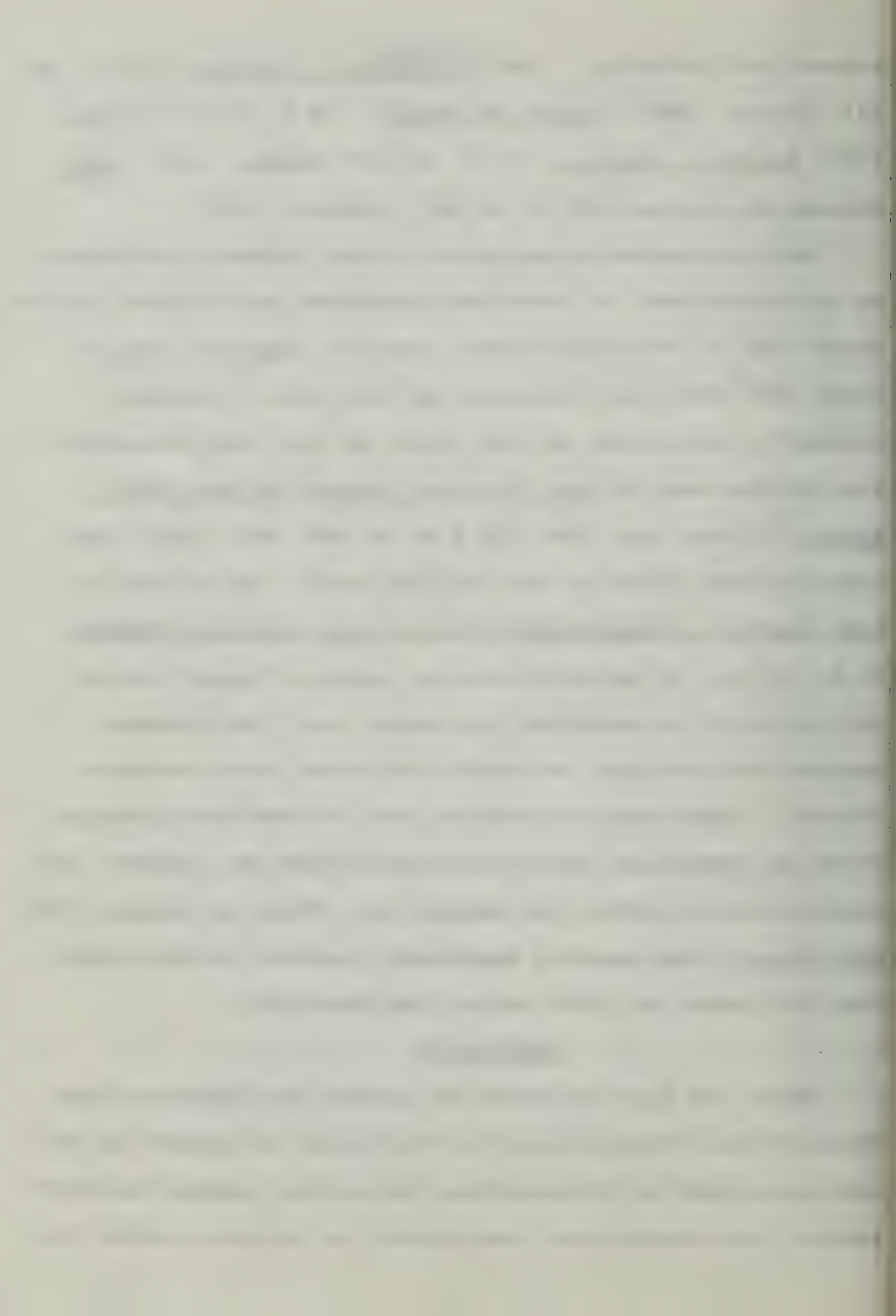
The Alabama rule set forth in the case of United States v. Maryland Casualty Co., 204 F. 2d 912 (5th Cir. 1953) almost certainly would be followed by the Alaska Supreme Court if it were to rule on the applicability of the judgment in the subject case under the circumstances here involved. Since the matter is one of substance it is controlled by Alaska law, (See 204 F. 2d 912, 915) and the Supreme Court of Alaska has not spoken as yet on the subject. The Alaska Supreme Court has shown its liberal tendencies and its reluctance to follow

stereotyped authority. (See Fairbanks v. Schaible, 375 P. 2d 201 (Alaska, 1962); Cramer v. Cramer, 379 P. 2d 95 (Alaska, 1963; Svacek v. Shelley, 359 P. 2d 127 (Alaska, 1961); Stephenson vs. Durion, 401 P. 2d 423 (Alaska, 1965)).

With reference to the effect of the judgment pertaining to the amount due, it could not constitute any evidence of the amount due in the subject case since the complaint itself shows that additional payments had been made. Moreover, counsel's authorities on this point are far from persuasive. Thus in the case of Home Insurance Company of New York v. Savage, 231 Mo. App. 569, 103 S.W. 2d 900, 901 (1937), the sureties were joined in the original suit. In the case of Lake County v. Massachusetts Bonding and Insurance Company, 84 F. 2d 115, it was held that the burden of proof was on the plaintiff to establish the amount due. The judgment against the principal was held to be prima facie evidence thereof. There was no situation such as that here involved where the complaint itself established that the judgment did not accurately reflect the amount due. Thus, in essence, the Lake County case supports appellees' position to the effect that the burden of proof was on the plaintiff.

CONCLUSION

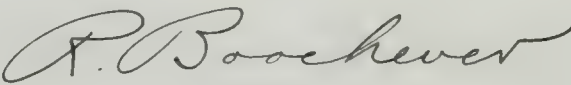
There was ample evidence to justify the finding of the District Court that evidence of the amount of payment on the note guaranteed by the appellees and on the judgment secured against the corporations, was chiefly or entirely within the



control of the appellant. The appellant having undertaken the burden of proving the amount due and having failed in its efforts at such proof, may not now successfully contend that the burden should have been placed on appellees under the circumstances here involved. Accordingly, it is respectfully submitted that the judgment below should be affirmed.

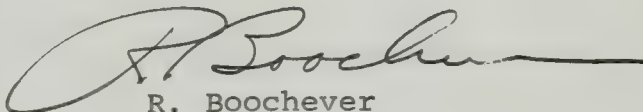
Respectfully submitted,

FAULKNER, BANFIELD, BOOCHEVER & DOOGAN

By 
R. Boochever
of Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.


R. Boochever

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No. 20374

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Appellant,)
)
vs.)
)
HOWARD C. HAYES,)
STANWOOD P. WHITELEY, et al,)
)
Appellees.)
_____)

FEB 10 1967

SUPPLEMENTAL BRIEF
FOR THE APPELLEES

On appeal from the United States District Court for the
District of Alaska

R. BOOCHEVER
of Attorneys for Appellees

FILED

MAY 2 1966

WM. B. LUCK, CLERK

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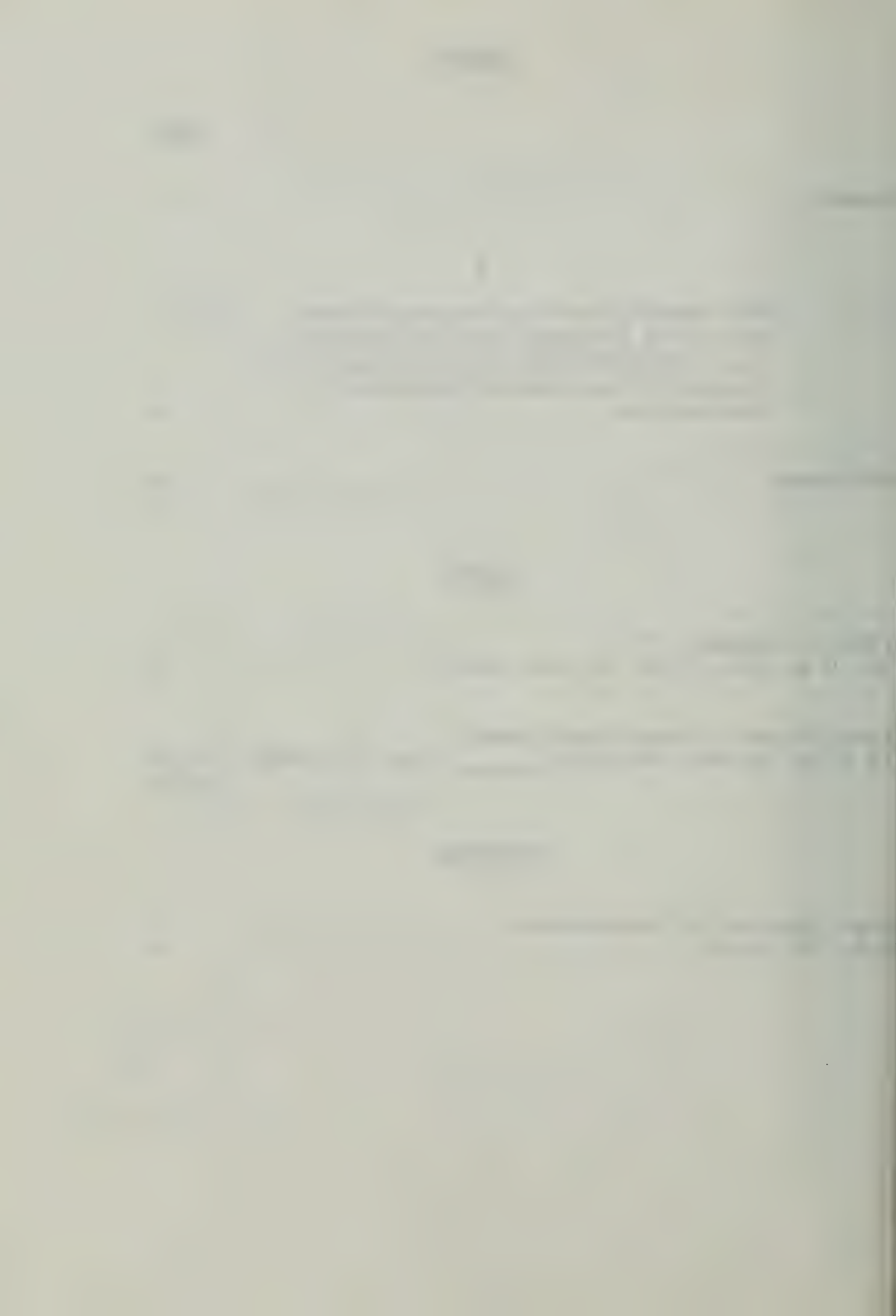
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Appellant,)	
)	
vs.)	
)	
HOWARD C. HAYES,)	
STANWOOD P. WHITELEY, et al,)	
)	
Appellees.)	SUPPLEMENTAL BRIEF FOR THE APPELLEES

ARGUMENT

I

THE DECISION OF THE DISTRICT COURT SHOULD BE
AFFIRMED FOR THE REASON THAT THE GOVERNMENT'S
CLAIM WAS BARRED BY APPLICABLE STATUTE OF
LIMITATIONS

The appellees, defendants below, raised as an affirmative defense that the applicable Alaska Statute of Limitations barred the subject suit (R. 10). This same defense was set forth by means of motion for summary judgement which was denied by the Court below after having rendered its memorandum decision dated May 22, 1963 (R. 12-14). The sole basis for denying the motion for summary judgement was that existing authorities indicated that the United States was not bound by state statute of limitations under the circumstances here involved. Subsequent to the decision of the district court, the Supreme Court of the United States rendered its decision in the case of United

States v. Ethel Mae Yazell, 15 L.Ed. 2d 404, 86 S.Ct. _____, (Jan. 17 1966), which decision alters the prior law as to the applicability of state law pertaining to commercial transactions conducted by the government and clearly indicates the judgement for appellees should be affirmed for the additional reason that the claim was barred by the statute of limitations.

At the outset, it is to be noted that the trial court's judgement should be sustained upon any theory established by the pleadings and supported by the proof. Jaffke v. Dunham, 352 U.S. 280, L.Ed. 2d 314 (1957). While appellees feel that the decision of the Court below is amply supported for the reasons advanced by that court, as a result of the case of United States v. Ethel Mae Yazell, supra, decided subsequent to the decision of the Court below, the district court's decision should further be sustained for the reason that the claim was barred by the applicable statute of limitations, A.S. 09.10.050.

The subject suit originated in a commercial transaction in which a governmental corporation, the Reconstruction Finance Corporation, negotiated a loan relying on all of the accepted protections to be found in similar transactions enacted between private individuals or corporations. Under these circumstances the Alaska Statute of Limitations, A.S. 09.10.050, applied. This section specified that an action "upon a contract or liability expressed or implied" must be "commenced within six years". The note on which suit was brought in this case was executed on

May 28, 1953, and had a maturity date of December 15, 1955. The guarantee on which this suit was brought was executed on May 28, 1953. Suit was not filed until September 24, 1962.

The suit was thus brought more than six years after the date on which the promissory note matured and the statute of limitations would be applicable unless the defense is barred in a commercial transaction resulting in a suit brought by the United States.

In the case of United States v. Ethel Mae Yazell, supra, the Federal Government sought recovery of the balance due on a loan made by the Small Business Administration. At the time that the loan was made, Texas law provided that a married woman could not bind her separate property unless she first obtained a court decree removing her disability to contract. Mrs. Yazell had not obtained such a court decree. The Supreme Court held that the state rule governed and that recovery could not be had against Mrs. Yazell, although Mrs. Yazell had signed the note with her husband which indicated that he and she were "doing business as" Yazell's Little Ages. The Court summarized its position at 15 L. Ed. 2d at 409 as follows:

"The issue is whether the Federal Government may voluntarily and deliberately make a negotiated contract with knowledge of the limited capacity and liability of the persons with whom it contracts, and thereafter insist, in disregard of such limitation, upon collecting (a) despite state law to the contrary relating to family property rights and liabilities, and (b) in the absence of federal



statute, regulation or even any contract provision indicating that the state law would be disregarded."

Similarly, in the subject case where the government voluntarily and deliberately negotiated a contract with knowledge of the Alaska Statute of Limitations it cannot disregard that statute "in the absence of federal statute, regulation or even any contract provision indicating that the state law would be disregarded". The Court further stated at page 411:

"Clearly, in the case of these SBA loans there is no 'federal interest' which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes."

The Court concluded at page 413 and 414:

"There is no problem in complying with state law; in fact, SBA transactions in each State are specifically and in great detail adapted to state law. There is in this case no defensible reason to override state law unless, despite the contrary indications in *Fink v O'Neil* and elsewhere as has been set forth, we are to take the position that the Federal Government is entitled to collect regardless of the limits of its contract and regardless of any state laws, however local and peculiarly domestic they may be."

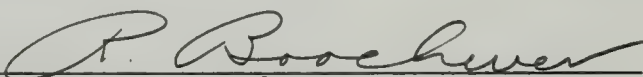
There is absolutely no reason why the government when entering the commercial field should not be bound by the applicable state law in the same manner that large banks and corporations are bound by those provisions. There is nothing in the

statute establishing the Reconstruction Finance Corporation or in the loan documents themselves indicating that the state statute of limitations would not be applicable. Accordingly, the judgement of the Court below (which is amply supported by the reasons advanced by the Court) should further be sustained for the additional reason that the claim is barred by the applicable Alaska Statute of Limitations.

DATED at Juneau, Alaska, this 15th day of April, 1966.

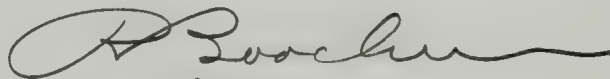
Respectfully submitted,

FAULKNER, BANFIELD, BOOCHEVER & DOOGAN

By 
R. Boochever
of Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.


R. Boochever

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

HOWARD C. HAYES, ET AL.,

Appellees

FEB 10 1967

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RESPONSE TO SUPPLEMENTAL BRIEF
FOR THE APPELLEES

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Washington, D. C. 20530.

FILED

JUN 17 1966

WM. B. LUCK, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20374

UNITED STATES OF AMERICA,

Appellant

v.

HOWARD C. HAYES, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RESPONSE TO SUPPLEMENTAL BRIEF
FOR THE APPELLEES

Only a brief response to appellees' Supplemental brief is necessary. Appellees urge that the recent decision in United States v. Yazell, 382 U.S. 341, supports their contention that state statutes of limitation may be applied to suits brought by the Government on claims of the Small Business Administration or the Reconstruction Finance Corporation.

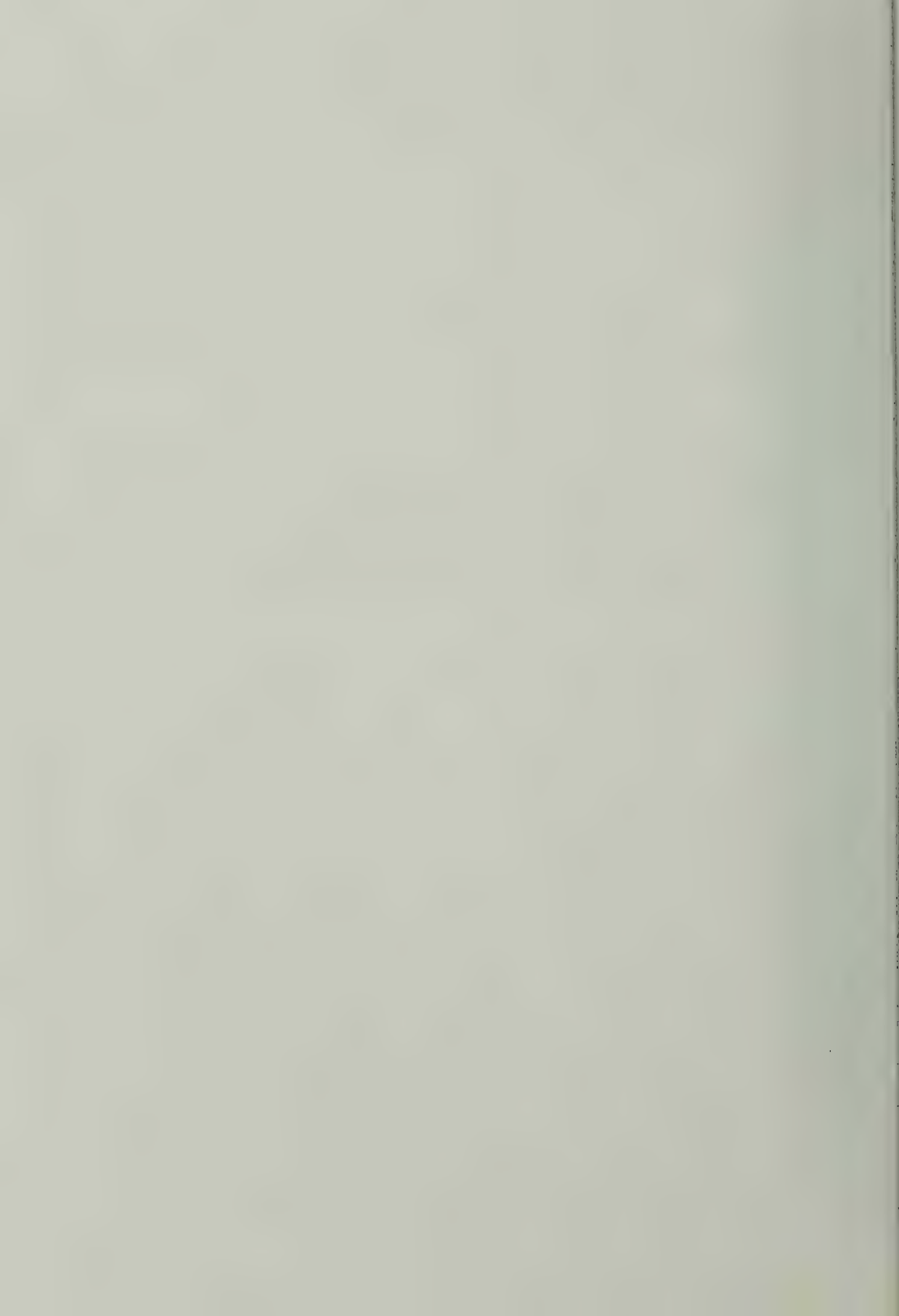
This contention is without substance. Indeed on the same day that it decided Yazell, the Supreme Court denied review of a decision of the Court of Appeals for the Second

Circuit, squarely rejecting the identical contention. See United States v. 93 Court Corp., 350 F. 2d 386 (C.A. 2), certiorari denied, 382 U.S. 984. Accord: United States v. Borin, 209 F. 2d 145 (C.A. 5), certiorari denied, 348 U.S. 821.

The reason for the settled doctrine that no statute of limitations may be applied, absent Congressional permission, to suits by the Government, was well stated in Acme Process Equipment Co. v. United States, 347 F. 2d 538, 552 (Ct. Cl.):

The long succession of cases refusing to apply the statute of limitations against the United States rests on the principle "which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." United States v. Nashville, Chattanooga & St. Louis Ry., 118 U.S. 120, 125

This principle was not involved in Yazell, which does not deal with the issue at all. And, as the Court of Claims pointed out, the line of cases holding that statutes of limitations may not be applied against the United States is indeed "long," beginning with Mr. Justice (then Circuit Justice) Story's opinion in United States v. Hoar, 2 Mason 311, 26 Fed. Cas. 329, 330 (Cas. No. 15,373) (D. Mass. 1821). See also United States v. John Hancock Mut. Ins. Co., 364 U.S. 301, 308 ("the United States is not subject to local statutes of limitations"); United States v. Summerlin, 310 U.S. 414, 416 (the proposition that "the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights" is "well settled");



Chesapeake & Del. Canal Co. v. United States, 250 U.S. 123;
United States v. Nashville, Chattanooga & St. Louis Ry., 118
U.S. 120; United States v. Thompson, 98 U.S. 486; United
States v. Rose, 346 F. 2d 985, 990 (C.A. 3), certiorari
denied, U.S. .1/

Obviously, Yazell, which does not discuss the issue,
does not alter this unbroken line of authority. Rather, it
turns on considerations not present here: (1) that in
making the loan involved there, the parties probably took
into account the Texas coverture doctrine and (2) that there
was a strong state interest in family-property arrangements
which Congress would not be presumed to have overridden. In
light of the solid line of Supreme Court authority that state
statutes of limitations may not be applied to the United
States, appellees cannot claim that the guarantee in this
case was negotiated with the Alaska statute of limitations
in mind. 2/ Neither is there involved here any strong state
policy which would justify departure from the long-standing

1/ There have been a number of decisions applying this principle
to suits by the United States on claims held by the RFC. See
United States v. 93 Court Corp., *supra*; United States v. Borin,
supra; United States v. New York Dock Co., 100 F. Supp. 303
(S.D.N.Y.); RFC v. Marcum, 100 F. Supp. 953 (W.D. Mo.); RFC
v. McCarthy Bros., 117 F. Supp. 834 (N.D. Cal.); United States
v. Utica Meat Co., 135 F. Supp. 834 (N.D.N.Y.); United States
v. Scott, 139 F. Supp. 921 (S.D.N.Y.); United States v.
Tambasco, 144 F. Supp. 729 (N.D.N.Y.). Contra, RFC v. Foster
Wheeler Co., 70 F. Supp. 420 (S.D. Tex.).

2/ Also without basis is appellees' suggestion that the United
States should be subjected to the local statute of limitations
because it was "entering the commercial field." (Supp. br. 4).
This is well answered in United States v. 93 Court Corp., *supra*,
350 F. 2d at 389, and needs no further exposition here.

principle that the negligence of government agents cannot prejudice the public interest. When Congress, which surely is aware of the problem, has thought it proper, it has specifically enacted statutory limitations upon Government claims.^{3/} We respectfully submit that this Court should follow the ruling of the Second Circuit in United States v. 93 Court Corp., supra.

CONCLUSION

The additional defense raised by the appellees is without merit. For the reasons stated in our main brief and reply brief, we respectfully submit that the judgment of the district court should be reversed, with instructions to enter judgment in favor of the United States in the amount of \$30,691.67, plus accrued interest.

Respectfully submitted,

JOHN W. DOUGLAS,
Assistant Attorney General,

RICHARD L. McVEIGH,
United States Attorney,

MORTON HOLLANDER,
WALTER H. FLEISCHER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

MAY 1966

^{3/} See, e.g., the 5 year statute of limitations upon suits for civil fines and penalties, 28 U.S.C. 2462, and the 6 year statute of limitations on suits under the False Claims Act, 31 U.S.C. 235.

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

Walter H. Fleischer

WALTER H. FLEISCHER,
Attorney,
Department of Justice,
Washington, D. C. 20530.

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UNITED STATES OF AMERICA,

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Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR THE APPELLANT

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MORTON HOLLANDER,
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Attorneys,
Department of Justice,
Washington, D. C. 20530.

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31A C.J.S. Evidence § 113----- 8

4 Collier on Bankruptcy § 70 (a)(5), p. 1051----- 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20374

UNITED STATES OF AMERICA,

Appellant

v.

HOWARD C. HAYES, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

REPLY BRIEF FOR THE APPELLANT

Appellees raise several points which require a short response.

1. Appellees urge that the United States is "estopped" from contending that the judgment entered against Hayes and Whiteley Enterprises was prima facie evidence of the debt of its guarantors, Messrs. Hayes and Whiteley. Appellees attempt to find an estoppel or "waiver" of the issue in the Government's pre-trial memorandum (R. 35a), which states that the Government expects to prove the allegation in the complaint that the judgment remained unpaid in the amount of \$30,691.67, plus interest (R. 2).

The district court regarded the issue of burden of proof as being properly raised, and expressly ruled on it, concluding that "under the facts and circumstances of this case plaintiff had the

burden of proving the amount due on the indebtedness guaranteed by the defendants" (R. 34). There can be no question that even were appellees correct in asserting that the pre-trial order did not include the issue, that defect would be cured "de facto," by the district court's explicit decision on the issue. Interstate Plywood Sales Co. v. Interstate Container Corp., 331 F. 2d 449, 452 (C.A. 9); American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F. 2d 640, 643 (C.A. 9); Bucky v. Sebo, 208 F. 2d 304, 305 (C.A. 2).

Moreover, appellees contention is insubstantial. Appellees do not suggest that they were misled by, or relied to their detriment upon, the statement in which they purport to find a basis for "estoppel" or "waiver". Appellees have never indicated any interest in attempting to prove payment of the judgment in question; they did not plead payment, and admitted that they had made no payments (R. 5, 10). And appellees hardly would have withheld from the district court any evidence of payment favorable to them, no matter what they thought the Government would prove at trial. Moreover, counsel for the appellees evidently understood at the outset of the trial that this issue was presented, for he objected to the judgment "being binding on these individual defendants who were not parties to that action" (Tr. 5, 12).

Moreover, the pre-trial statement does not admit, in any way, that the Government had the burden of proving the amount due on the judgment (much less that the judgment would not satisfy that initial burden and shift the burden of proof to the appellees).^{1/}

^{1/} The "estoppel" argument confuses this initial burden with the burden of showing payment which pertains after the judgment is introduced in evidence. If the question is asked, "did the United States undertake to show the amount owed?" appellees' contention
(footnote continued on page 3)

At most, it was an indication that the Government would attempt to prove something not required of it. If the burden of showing payment was in fact on the appellees, who devoted their efforts to obstructing all attempts to show the amount due (see Tr. 5-12) the United States was entitled to invoke that burden.^{2/} The "estoppel" contention is therefore baseless, as well as being foreclosed by the district court's decision on the point.

2. Raising yet another procedural objection to this clearly meritorious claim, appellees challenge the sufficiency of one of the specifications of error in our main brief (br. 6), which states: "The district court erred in 'finding' that evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States." Appellees do not claim any difficulty in understanding the Government's position on this point; evidently the specification adequately served its purpose. However, even were there some harmless technical defect in the specification, we respectfully submit that it may be cured by

1/ (continued from page 2)

might have a superficial allure. But if the further question is asked, "did the United States admit that the judgment itself would not show the amount due, as a prima facie matter?" appellees contention is seen to be erroneous. Nothing in this Record would permit a conclusion that the latter point was conceded.

2/ Additionally, the statement on which appellees rely was made when the United States thought "that after pre-trial there will be no issues of fact and no necessity for trial" (R. 35a). The issues presented on this appeal arose because appellees objected to the introduction in evidence of the judgment and the certified statement of account; thus appellees are asserting that the Government has waived an issue which had not arisen when the statement on which they rely was made, and which arose only because of appellees' own actions.

amending it to state what already is implicit therein: "The district court erred in 'finding' that evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States, because such evidence also was easily accessible to appellees." See Pacific Queen Fisheries v. Symes, 307 F. 2d 700, 705 (C.A. 9).^{3/}

3. In fact, there can be no question that such evidence was easily accessible to the appellees. As stated in our main brief (pp. 9-11), appellees merely had to look at the files of the Bankruptcy Court or correspond with the trustee. Most of appellees' argument on this point simply obscures the issue. Thus appellees claim that they were "lulled" into not following the affairs of Hayes and Whiteley Enterprises after bankruptcy, and that they stayed away from the property. But even were this completely true,^{4/} it would not mean that evidence of payment on the judgment was peculiarly within the control of the United States. Once appellees were sued, all the information they needed was in the bankruptcy file, which was just as available to them as to the United States.

3/ Inasmuch as the district court gave no reasons for its conclusion that such evidence was chiefly or entirely within the Government's control, it is difficult to be more specific.

4/ Appellees claim that they were led to understand that they would not be held liable on their guaranty by an RFC employee. While not passing directly on this claim, the district court found (R. 32) that "The proof fails to establish that Hugh (sic) Guenther had authority to orally release defendants from the guaranty or that he did so." Appellees do not challenge this finding here.

At trial Mr. Hayes stated that he had personal knowledge of some of the proceedings in Bankruptcy (Tr. 25). Clearly it is not true that appellees "had no means of keeping directly informed of the affairs of the corporations" (Appellees' br. 11).

Appellees assert that (Br. 17) "There is no reason to believe that the bankruptcy file would contain information respecting payment of the judgment in question" and that the trustee would have no reason to keep records because "the corporations were hopelessly insolvent." These assertions are plainly wrong, because the trustee has a statutory duty to "keep records and accounts showing all amounts and items of property received and from what sources, all amounts expended and for what purposes and all items of property disposed of." 11 U.S.C. 75(a)(5), and because as a matter of common sense (and common law, too)^{5/} anyone administering an estate of any kind would keep such records. The insolvency of the estate obviously would not change this; trustees in bankruptcy are not appointed to administer solvent enterprises.^{6/}

As a practical matter, this judgment could have been paid from two sources: the trustee and the defendants.^{7/} Defendants

^{5/} See 2 Scott on Trusts §172 (1956).

^{6/} Were appellees' argument correct, no trustee in bankruptcy would ever need keep records.

^{7/} Appellees rely on the fact that some small payments on the debt were made by persons other than the trustee, see Answers to Interrogatories (R. 8). But these payments were made before Hayes and Whiteley Enterprises went into bankruptcy (in January 1955, see Exh. E, p. 13). It is difficult to believe that anyone other than appellees or the trustee would make payments after bankruptcy, but no less than preposterous to think that such a third party would do so without notifying either Messrs. Hayes and Whiteley or the trustee.

Appellees also urge that payment might have been made on the debt without their knowledge through summary foreclosure on chattels (Br. 12). If such foreclosure had occurred, however, this too would be revealed by the bankruptcy file, for subsequent to bankruptcy, "the mortgagee may not in any event institute foreclosure proceedings or otherwise take possession of the property without the court's express authorization." 4 Collier on Bankruptcy §70(a)(5) p. 1051; Straton v. New, 283 U.S. 318, 321; Investors Syndicate v. Smith, 105 F. 2d 611, 621 (C.A. 9). But cf. Gins v. Mauser Plumbing Supply Co., 148 F. 2d 974, 979-80 (C.A. 2), indicating that a sale of pledged securities before notice to the trustee might be possible, but would be subject to careful scrutiny thereafter.

admit that they made no payments (R. 5, 10). To find out whether other payments had been made, they merely had to look at the bankruptcy file. Therefore this is not a case where evidence of what payments had been made was "chiefly or entirely" within the control of one party. If a judgment entered against Hayes and Whiteley Enterprises ordinarily would be prima facie evidence of its debt in a subsequent suit against the guarantors, and the burden of proving payment is upon the guarantors, that rule pertains here.

The cases upon which appellees rely in no way support the contrary decision below. In Selma, Rome & Dalton R. Co. v. United States, 139 U.S. 560, 566-68, the Court held that the railroad had the burden of proving that the Confederate Government had not paid the debt owed it by the United States for three reasons: (1) the statute under which the railroad sued so placed the burden, (2) the fact that the Confederate Government had passed legislation for the payment of such debts to claimants who, like the railroad, were loyal to the Confederate cause, raised a presumption that such payment had been made, and (3) the railroad had superior access to the facts, because its books (which it did not attempt to produce), would show payment or non-payment, but the United States had no reasonable way of ascertaining what payments the Confederate Government made to the railroad. By contrast Messrs. Hayes and Whiteley could easily ascertain what payments had been made here.

In Schneider v. Maney, 242 Mo. 36, 145 S.W. 823 (1912), the court held that the creditor had the burden of proving, in a suit

against a surety, how much of three separate judgments against the principal debtor had been paid by five co-sureties, who had been released from their obligations, and remanded the case for a new trial. The court stressed the refusal of the creditor to make known the information within his knowledge.^{8/} Explaining Schneider in a later decision, the Missouri Supreme Court said: "this rule applies particularly to cases of ambiguity, concealment, or evasion The peculiar facts in that case justified its application." Emory v. Emory, 53 S.W. 2d 908, 913 (Mo. 1932). The rule may not be routinely invoked to defeat the settled principle that "ordinarily payment is an affirmative plea." Haycraft v. Haycraft, 154 S.W. 2d 617, 622 (Mo. App. 1941).

This case presents a situation opposite to that in Schneider. Here the United States has willingly divulged all information in its possession respecting the payment of this judgment, even though appellees could have obtained this information elsewhere without difficulty. Appellees, on the other hand, while claiming that knowledge of payment was exclusively within the Government's control,

8/ Both Selma, Rome & Dalton R. Co. v. United States, *supra*, and Schneider v. Maney also were decisions rendered in a day when no effective discovery procedures existed, and attempts to discover simple information were sometimes denied as "fishing expeditions." Here, however, appellees have taken advantage of the Federal Rules of Civil Procedure to receive all the information they could need. The application of the "peculiar knowledge" doctrine to shift the ordinary burden of proof should be sparing in a day when modern discovery procedures require the sharing of information. Tortora v. General Motors Corp., 373 Mich. 563, 130 N.W. 2d 21, 24 (1964). Appellees appear to misunderstand our position on this point, when they assert (Br. 17-18) that the United States is attempting to use discovery to shift the burden of proof. It is the appellees who seek to shift the usual burden of proving payment from themselves by invoking the "peculiar knowledge" doctrine. We urge that the existence of discovery negates the need to change the ordinary burden of proof.

have vigorously opposed every attempt to place the relevant information into evidence (Tr. 5-12). Appellees run afoul of the principle that:

The party claiming that the burden should be shifted because of the unusual circumstances of the other party having knowledge or control of the evidence must be particularly diligent to place no obstacle in the path of the party so burdened.

[31A C.J.S. Evidence § 113; Cf. In re Petition of Boat Demand, Inc., 174 F. Supp. 668, 673 (D. Mass.)]

The "superior knowledge" doctrine relied upon by the district court is thus for several reasons wholly inapplicable to this case.^{9/}

4. Appellees offer little argument on the question of whether a judgment rendered against a principal is prima facie evidence of his debt in a suit against a surety. It should be so considered in general, and especially in this case. When a trustee in bankruptcy, charged with the duty to "object to the allowance of such claims as may be improper," 11 U.S.C. 75(a)(8), admits the propriety

^{9/} Other cases relied upon by appellees are even less pertinent than the ones discussed above. The purported quotation from Peterson v. Wilbanks, 163 Ga. 742, 137 S.E. 69 (1927), appearing in appellees' brief (p. 17) cannot be found in the reports contained in our library after several careful readings of the case. In fact, Georgia instead follows the majority rule that "a decree or judgment which binds the principal is prima facie evidence against the surety." Bradwell v. Spencer, 16 Ga. 578, 581-82 (1855).

State ex rel. Leary v. Hughes, 185 So. 69 (La. App. 1938), did not involve a suit against a surety upon a judgment rendered against his principal. Rather, it was held that under the circumstances of that case, a creditor who held a judgment against the debtor which was known to be at least partially satisfied, had the burden of showing how much had been paid, in a contest with another creditor. The court noted that there were no court records available to show how much had been paid, and that the creditor on whom the burden was placed was seemingly the only person who possessed the requisite information.

of the claim, surely this is prima facie evidence of the debt against a person who has "unconditionally" guaranteed "the due and punctual payment when due, whether by acceleration or otherwise ... of the principal of and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor" (R. 4).

We note that appellees do not suggest that there would have been any defense to the foreclosure suit. It is clear that the judgment entered here should thus be considered prima facie evidence against these guarantors, regardless of whether or not this Court would choose to follow "the great majority" of other courts holding that a default judgment entered against the principal is in general prima facie evidence against the sureties, see Commonwealth to the Use of Ulshofer v. Turner, 340 Pa. 468, 17 A. 2d 352, 354 (1941). Moreover, for the reasons stated in our main brief (pp. 14-15), which appellees do not undertake to answer, the majority rule is not just "stereotyped authority" (Appellees br. 24), and should be followed, if this Court considers that a choice is necessary.

Finally, appellees argue that the judgment against Hayes and Whiteley Enterprises is not prima facie evidence of their debt because the complaint (R. 1-3) does not seek recovery of the full amount of the judgment. Such a contention was well answered in Machetinger v. Grenzebach, 282 S.W. 2d 200 (Mo. App. 1955). There plaintiff produced invoices totalling \$334, of which \$80 worth were cancelled. The defendant urged that because partial payment was thus shown, plaintiff had the burden of proving the amount due. The court answered (282 S.W. 2d at 202):

A plaintiff is under no duty to allege non-payment of the obligation sued upon, and a defendant must affirmatively plead payment Even if defendant did

affirmatively plead payment, he would have the burden of proving it; and it would not be necessary for plaintiffs, even if they had alleged non-payment, to prove it.... Of course, plaintiff's evidence that \$80 had been paid on the account constituted a binding admission pro tanto, but it did not shift the burden of proof from defendant to plaintiffs as to how much had been paid.

Similarly, the fact that the United States sought recovery of less than the full amount of the judgment does not change the burden of proof here. Instead the Government was entitled to recovery any amount not in excess of the amount of the judgment, unless appellees produced evidence of payment to negate the amount claimed. It would be illogical, and productive of fictitious pleading, to hold that although the defendant has the burden of proving payment when the complaint asks recovery of the full amount of the judgment, the plaintiff is placed in a worse position, and must carry the burden of proof, when he asks recovery of less money.

Of course, appellees know why recovery of \$30,691.67 plus interest was sought instead of the face amount of the judgment, for they are just as familiar as the Government with the Marshal's Return on Execution, showing the judgment to be unpaid in the amount of \$30,691.67 (Exh. D). But it also cannot avail appellees if everyone pretends that this court record does not exist.^{10/}

This is so, because appellees cannot properly say that it is known that the judgment was partially paid, when, as a result of

^{10/} Appellees correctly state that the Return on Execution was only marked for identification and not placed into evidence. However, they were free to offer it as evidence, and the district court could have taken judicial notice of it. Although the district court apparently did not take notice of the bankruptcy file, as requested (Tr. 46-48), it surely should have noticed this single document (if it did not actually do so), and there is no reason why this Court could not take notice of it.

their successful efforts to exclude evidence of payment, there is no "evidence" of such partial payment in the record, but only the prayer in the complaint asking recovery of \$30,691.67, plus interest. Although this prayer for relief limits the amount recoverable, it does not shift the burden from the appellees.

CONCLUSION

For the reasons stated above, and in our main brief, we respectfully submit that the judgment of the district court should be reversed, with instructions to enter judgment in favor of the United States in the amount of \$30,691.67, plus accrued interest.

Respectfully submitted,

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APRIL 1966

CERTIFICATE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with these rules.

Walter H. Fleischer

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United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT E. RUTHERFORD,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

FEB 10 1957

No. 20377

*Appeal from a judgment of the United States District
Court for the Eastern District of Washington,
Northern Division*

HONORABLE CHARLES L. POWELL, *Judge*

BRIEF FOR APPELLANT

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ROBERT E. RUTHERFORD,	}	No. 20377
<i>Appellant,</i>		
vs.	}	
UNITED STATES OF AMERICA,		
<i>Appellee.</i>		

*Appeal from a judgment of the United States District
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Point II: Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment, for the reason that the proceedings wherein he so declined arose out of a civil action for damages in two counts, the first pursuant to proceedings under the False Claims Statute, and the other pursuant to proceedings under the Anti-Trust Laws, the first of which because of material and substantial differences, and requirements of proof, precludes any extension of immunity to Rutherford's testimony if, in fact, any immunity attached under 15 U.S.C. Section 32.....24

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*Appeal from a judgment of the United States District
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HONORABLE CHARLES L. POWELL, *Judge*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a certification and order by the District Court for the Eastern District of Washington, Northern Division, holding that the appellant Rutherford committed contempt of court in the presence of the Honorable Charles L. Powell. The contempt was summarily punished under the provisions of Rule 42(a) of the Federal Rules of Criminal Procedure. The alleged contempt consisted of the refusal of appellant witness to answer certain questions as to which the witness claimed the privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States, after the District Court

had denied and overruled the claim of privilege and instructed him to answer. In consequence thereof the District Court provided in its order as follows:

“IT IS ORDERED that the defendant Robert E. Rutherford be, and he hereby is committed to the custody of the Attorney General, or his representative, for imprisonment for a term of ninety (90) days.

“IT IS ORDERED that the execution of said sentence be suspended pending a final order by the appropriate Appellate Court.

“IT IS FURTHER ORDERED AND PROVIDED that in the event this order shall be sustained on appeal, the said defendant Robert E. Rutherford shall be afforded an opportunity to purge himself of said contempt within a time of sixty (60) days from the entry of said order.”

This appeal is therefore prosecuted, and jurisdiction of this Court is conferred by 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

The issue presented here is whether or not the District Court erred in denying and overruling the appellant's claim of privilege and then holding appellant in contempt for failure to answer the questions propounded in the presence of the Court. Appellant had refused to answer such questions propounded by appellee at deposition on the 17th day of November 1964.

STATEMENT OF THE CASE

The alleged contempt took place following the taking of the deposition of appellant Rutherford, on behalf of appellee pursuant to subpoena and stipulation

of counsel, which was continued thereafter before the Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, in the United States District Courtroom at the Federal Building, Spokane, Washington, on June 23, 1965 (CT pp. 48-52 incl., RT pp. 12-25 incl.).

The civil action, out of which contempt proceedings arose, was instituted by appellee in two counts pursuant to and as provided by Section 3490, et seq. of the Revised Statutes, Sections 231-233 incl. commonly known as the False Claims Act, and Section 4(A) of the Act of Congress of October 15, 1914, as amended (15 U.S.C. Sec. 15(a) commonly known as the Clayton Act). Appellee seeks damages with civil penalties from Carnation Company of Washington and Inland Empire Dairy Association, defendants in civil action No. 2297, for alleged conspiracy and agreement to defraud and injure appellee, and for conspiracy to eliminate and suppress competition in unreasonable restraint of interstate trade (CT pp. 11-22 incl.).

Prior to commencement of the civil proceedings on August 28, 1962, appellant Rutherford testified before a Grand Jury investigating anti-trust violations in the Eastern Washington area. Appellant, at the time of his appearance before the Grand Jury, refused to waive immunity and was required to testify. At the time of the Grand Jury investigation Mr. Joseph M. Glick, the manager of the Inland Empire Dairy Association, defendant in both the subsequent criminal indictment, and the civil action out of which these proceedings arose, did waive immunity. The Grand Jury indicted Carnation Company of Washington,

Inland Empire Dairy Association and Joseph M. Glick. Pleas of *nolo contendere* were made by all defendants to the indictment, and the Court, following acceptance of the *nolo contendere* pleas, adjudged all of the defendants guilty, fining Carnation Company \$20,000.00, Inland Empire Dairy Association \$20,000.00, and the defendant Joseph M. Glick \$2,000.00 on Count I and \$500.00 on Count II (CT pp. 1-7 incl., 8-10 incl., 24, 28).

Before he was required to appear for deposition by appellee, appellant Rutherford was sought to be deposed, by co-defendant in both criminal indictment and the civil action, Inland Empire Dairy Association, (deposition Robert E. Rutherford 10-15-64), and his refusal to testify was sustained by the District Court (CT pp. 24-25).

Thereafter deposition hearing was required by appellee (deposition of Robert E. Rutherford 11-17-64). Appellant refused to make answer to the questions put to him by appellee, justifying his refusal on the claim of protection granted him by the Fifth Amendment of the Constitution of the United States.

The District Court sustained the claim of immunity of the appellant in an opinion and subsequent order (CT pp. 28-33 incl.).

Following motion and memorandum submitted to the Court by appellee to reconsider the order sustaining appellant's refusal to answer questions of appellee, the Court granted appellee's motion to reconsider and entered its order that appellant witness Rutherford shall, when called, answer the questions

put to him by counsel during the further taking of testimony by deposition (CT 34-36 incl., 41-49 incl.). Thereupon the appellee in continuance of the deposition in open Court before the District Judge, Honorable Charles L. Powell, propounded again the series of deposition questions. Appellant invoked the Fifth Amendment and refused to answer. Upon being advised by the Court that he was clothed with immunity and must answer, the appellant continued to refuse and was held in contempt of Court (RT pp. 12-25 incl.).

Following entry of the certification and order of the Court on the 24th day of June, 1965, appellant timely filed notice of appeal to this Court.

In accord with this Court's order the record on appeal was thereafter timely docketed and the statement of points filed.

CONSTITUTIONAL CLAUSES AND STATUTES INVOLVED

Constitution; Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of war or public danger; *nor shall any person* be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (Clause underscored).

15 U.S.C. 32:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under Sections 1-7 of this title and all Acts amendatory thereof or supplementary thereto, and Sections 8-11 of this title; provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

* * * * *

15 U.S.C. 15:

"Sec. 15. Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

* * * * *

15 U.S.C. 15(a):

"Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover actual damages by it sustained and the cost of suit."

31 U.S.C., Sec. 231. Liability of persons making false claims.

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person

who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

* * * * *

31 U.S.C., Sec. 232. Same; suits; procedure:

"(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

"(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

"(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill

of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided*, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however*, That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

“(D) In any suit whether or not on appeal pending on December 23, 1943, brought under

this section, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C) of this section.

“(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

“(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B) of this section, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or

that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States."

* * * * *

31 U.S.C., Sec. 233. Duty of United States attorney as to such cases.

"It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of \$2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit."

STATEMENT OF POINTS

1. Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment for the reason, that the extent of immunity granted within 15 U.S.C. Section 32 does not extend to the civil action brought by the United States in its suit for damages, because it is not a suit proceeding or prosecution under the meaning of 15 U.S.C. Section 32. The suit for damages of plaintiff United States is not a proceeding for enforcement of the Anti-Trust Laws.

2. Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment, for the reason that the proceedings wherein he so declined arose out of a civil action for damages in two counts, the first pursuant to proceedings under the False Claims Statute, and the other pursuant to proceedings under the Anti-Trust Laws, the first of which because of material and substantial differences, and requirements of proof, precludes any extension of immunity to Rutherford's testimony if, in fact, any immunity attached under 15 U.S.C. Section 32.

3. Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment, for the reason that he had a substantial and reasonable cause to apprehend danger in the testimony sought to be elicited from him, because the proceedings in the civil action, evidenced by the record filed in this Court and cause, show that plaintiff United States and co-defendant Darigold not only sought, but promised to elicit testimony which had the probable and reasonable consequence of involving the witness in crimes committed subsequent to and following his testimony before the Grand Jury.

4. The immunity statute considered here and pertinent to these proceedings, 15 U.S.C. Section 32, is contrary to the provisions of the Fifth Amendment to the United States Constitution, and should now be held to be unconstitutional.

ARGUMENT

I.

Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment for the reason, that the extent of immunity granted within 15 U.S.C. Section 32 does not extend to the civil action brought by the United States in its suit for damages, because it is not a suit proceeding or prosecution under the meaning of 15 U.S.C. Section 32. The suit for damages of plaintiff United States is not a proceeding for enforcement of the Anti-Trust Laws.

We respectfully submit that "by any common-sense reading . . ." of 15 U.S.C. Section 32, it could not extend immunity to a civil action by the United States under 15(a), unless the action is within, or contemplated as supplementary to the Appropriations Act of 1903, discussed in *United States v. Welden*, (1964, 377 U.S. 95, 84 S. Ct. 1082, 12 L Ed 2d 152).

We propose to demonstrate that a civil action by the Government for damages under 15 U.S.C. 15(a) is not a proceeding for *enforcement* of the antitrust laws, and therefore the Government cannot avail itself of a witness' testimony, otherwise immunized by 15 U.S.C. 32.

15 U.S.C. Section 32 was enacted as a part of an Appropriations Act of 1903 and provides as follows:

"That for the enforcement of the provisions of the Act entitled 'An Act to regulate commerce' approved February fourth 1887, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and

commerce against unlawful restraints and monopolies,' approved July second 1890, and all Acts amendatory thereof or supplemental thereto, and Sections 73, 74, 75, and 76 of the Act entitled 'An Act to reduce taxation, to provide revenue for the government, and other purposes' approved August 27, 1894, the sum of five hundred thousand dollars to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits and prosecutions under said Acts in the Courts of the United States; provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts . . . 32 Stat. 903-904" (Emphasis supplied).

Not so long ago one Welden, feeling assured that he did so without risk, testified before a subcommittee of the House Select Committee on Small Business concerning matters of interest to the committee, such as conspiracies to fix milk prices and defraud the United States. It developed that Welden's assurance, from whatever source it may have come, was either mistakenly based, or ill-advised. Upon being indicted along with others on charges of conspiring to fix milk prices and to defraud the United States in violation of Section 1 of the Sherman Act and the Conspiracy Act, Welden sought dismissal on the ground that the prosecution was barred under the immunity provisions of the Act of February 25, 1903. He argued that he had previously testified before a subcommittee on

small business concerning the very matters covered by the indictment. Although the district judge rejected the government's contention that the immunity provisions of the Act extended only to judicial proceedings and not to hearing before Congressional committees, the Supreme Court reversed, and though two learned justices dissented, the majority asserted that:

"By any common-sense reading of this statute, the words 'any proceeding, suit, or prosecution under said Acts' in the proviso plainly refer to the phrase 'proceedings, suits, and prosecutions under said Acts *in the Courts of the United States*' in the previous clause. The words 'under said Acts' confirm that the immunity provision is limited to judicial proceedings, *which are brought 'under' specific existing Acts* [Emphasis supplied], such as the Sherman Act, or the Commerce Act. Congressional investigations, although they may relate to specific existing Acts, are not generally so restricted in purpose or scope as to be spoken of as being brought 'under' these Acts (377 U.S. 96, 97, 12 L Ed 2d 156).

We think it only logical, that since the words "in any proceedings, suit, or prosecution under said Acts" are to be modified by "in the courts of the United States," it is common-sense to assert that these words should also be modified by the word "enforcement" found in the introduction to the Appropriations Clause. Nor should we be mesmerized by any implication that the Fifth Amendment protection has lost its force because we can find over forty immunity acts within the confines of the *United States Code* (Yale Law Journal, Vol. 72, p. 1568). Indeed we should push into view the argument for reason, that finds

predominant support in legal authority, rules of construction, normal and accepted usage of words and terms, legislative history, and the statutory scheme.

The word "enforcement" can be employed in a variety of meanings, which come to depend upon the usage of the word in conjunction with, and in relation to criminal prosecutions, judgments, contracts, etc. Thus we speak of "enforcing" a contract, or a judgment. "Enforcement" in the context of the Appropriations Act of 1903 in normal and accepted usage relates only to declared purposes of the Act by way of criminal prosecution, injunction, or investigation. The Appropriations Act of 1903 gives not one hint that immunity was to be given in a 15(a) civil suit by the United States. Thus, the government utilizes a statute permitting damages, it does not enforce it.

Pertinent legislative history is found in Senate Report No. 619, *United States Code, Congressional and Administrative News, 84th Congress* (1955) Vol. 2:

"Proposals to permit the United States to sue for damages occasioned by antitrust violations have been directed to the Congress in past years. Section I of the Sherman Act as originally introduced in 1890 contemplated such an action by the United States in addition to other methods of enforcing the Act. The original Act was amended, and subsequently rewritten omitting reference to damage suits by the government and providing specific criminal and civil remedies by way of forfeiture. The damage suit by private parties was retained as Section 7 of the Sherman Act.

"At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective

method, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits" (p. 2329).

* * * * *

"*United States v. Cooper Corporation* (312 U.S. 600, 85 L Ed 1071, 61 S. Ct. 742 (1941) construed Section 7 of the Sherman Act to exclude the United States as a 'person' who might sue for the recovery of treble damages.

"It should be noted, however, that the bill would grant to the Government the right to recover *only actual, as distinguished from treble damages*. This difference in treatment is a recognition of the difference in the position of the United States and of 'persons' in this connection. Both may recover their actual damages. The damages of 'persons' are trebled so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws. The United States is, of course, charged by law with the enforcement of the antitrust laws and it would be *wholly improper* to write into the statute a provision whose chief purpose is to promote the institution of proceedings. *The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered*" (Emphasis supplied).

"*The committee feels that this remedial amendment to the existing statutes is important even in normal times when the large volume of government procurement may often subject the United States to unjustified exaction*" p. 2330 (Emphasis supplied).

"It can therefore be seen that not only are the provisions of State law establishing time limitations upon actions to recover a statutory liability inconclusive in so far as ascertaining the correct

period in which to bring suit is concerned, but they frequently create the additional problem of determining whether the statutory liability imposed under the antitrust laws is in the nature of a penalty or forfeiture, or otherwise."

We think that *United States v. Cooper Corp.*, 312 U.S. 600, 85 L Ed 1071, 61 S. Ct. 742, viewed in the light understood by the Congress in its legislative capacity, emphasizes the distinction between the civil remedy and the "enforcement" provisions of the Anti-Trust Act. So we read in *Cooper Corp.*, supra, as follows:

"The scheme and structure of the legislation are likewise important to a proper ascertainment of its purpose and intent. Sections 1, 2, and 3 impose criminal sanctions for violations of the acts denounced in those sections respectively. Section 4 gives jurisdiction to the federal courts of proceedings by the Government to restrain violations of the Act and imposes upon United States Attorneys the duty to institute equity proceedings to that end. Section 5 regulates service in such suits. Section 6 authorizes seizure, in the course of interstate transportation, of goods owned under any contract or pursuant to any conspiracy made illegal by the statute.

"Thus far the Act deals in detail with the criminal and civil remedies of the Government in vindication of the policy of the legislation. There follows Sec. 7, the only other substantive section, giving a civil action for an injury to property rights.

"It seems evident that the Act envisaged two classes of actions,—those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury. If this be the fair construction of the Act, the Court's task is finished when it gives effect to the purposes of the law, evidenced by the various rem-

edies it affords for different situations. Though the law gave a remedy by way of injunction at the suit of the United States, we were pressed to say that a private person should have the same remedy. We were compelled to answer that Congress had not seen fit so to provide. *For the like reasons we cannot hold that since a private purchaser is given a remedy for his losses in treble damages, the United States should be awarded the same remedy.*" (Emphasis supplied) (pp. 606-609 of 312 U.S.).

The reasoning of *Cooper*, supra, denies any claim that 15(a) is an "enforcement" statute.

Despite a paucity of court opinions directed to the problem here, there is support in *City of Burbank v. General Electric Co.*, a corporation, 329 F. 2d 825 (C.A. 9):

"(2) In considering the language to be interpreted, we find a slight change was made in it between the 1914 enactment, and the 1955 revision. The two primary concerns of the 1955 amendment to the Clayton Act (38 Stat. 730) were to grant the United States the right to recover *actual damages for injuries to its property* by reason of violation of the antitrust laws. (Clayton Act, Sec. 4(A), 15 U.S.C. sec. 15a) and to establish a uniform (four year) statute of limitations (Clayton Act, Sec. 4(B), 15 U.S.C. Sec. 15b)" p. 830 (Emphasis supplied).

That Congress did not intend that the umbrella of immunity should extend to witnesses in a 15(a) action *emerges from the fact that a civil action by the Government is remedial* and civil, not penal, for the United States is treated solely as a buyer of goods, proceeding under a strictly remedial amendment to the existing statute, which is clearly not an "enforce-

ment” provision. Additional amendments enacted with 15 U.S.C. 15(a) disclose that it is not an “enforcement” weapon. The United States has heretofore “enforced” the antitrust statutes; the civil action permits it only the remedial remedy accorded in the 15(a) amendment.

The underlying test to be applied in determining whether a statute is penal or remedial is whether *primarily* it seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual as just and reasonable compensation for a possible loss having a causal connection with a breach of the legal obligation owing under the statute to such individual.

Pertinent to the above in connection with 15 U.S.C. 15 is *City of Atlanta v. Chattanooga Foundry and Pipe Co.*, 127 F. 23, affirmed, 203 U.S. 390, 27 S. Ct. 65, 51 L Ed 241:

“The remedy is not given to the public, for no one may bring the action save the person ‘who shall be injured,’ etc.; and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the Act and additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of

compensation is not enough to constitute the action a penal action, . . .”

And see:

Aero Sales Co. v. Columbia Steel Co., 119 F. Supp. 693 (Dist. Ct. Calif. 1954).

With a view now to legislative history, *Welden*, supra, statutory construction and usage, and the remedial and civil character of 15 U.S.C. Sec. 15, we shall look at 15 U.S.C., Sec. 16(a)(b):

“(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.*

“(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, *but not including an action under section 15a of this title*, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is*

suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. As amended July 7, 1955" (Emphasis supplied).

Thus, the United States is treated the same as a "person" for it is entitled only to the same benefits provided other "persons" designated by the Congress. And here again *Cooper*, supra, provides guidance in its discussion of the statutory provisions creating estoppel by judgment and a statute of limitations.

"When Congress came to supplement the Sherman Act by the Clayton Act, it included in the latter a significant section bearing upon the question under consideration. Doubts had arisen as to whether issues adjudicated in a criminal proceeding or a suit in equity brought by the United States should be taken as concluded in an action for treble damages subsequently brought by an injured party. By Sec. 5 of the Clayton Act, 15 USCA Section 16, it was sought to give such adjudication that effect. The section provides:

'A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, this section shall not apply to consent judgments or decrees entered before any testimony has been taken.'

"Immediately following this provision the section continues:

'Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.'

"Here again it seems clear that Congress recognized the distinction between proceedings initiated by the Government to vindicate public rights and actions by private litigants for damages" (Emphasis supplied) (312 U.S. 609, 10).

Certainly these amendments belong in the conduit of Congress' intention that 15(a) is not an "enforcing" provision within 15 U.S.C. 32. Also see Black, J., dissenting in *Welden*, supra:

"The Antitrust Immunity Act of 1903 was passed at a time when the fear of prosecution was making testimony from witnesses often impossible to obtain and thereby impeding enforcement of the antitrust laws."

We submit in concluding this phase of argument that the certification and order of the District Court warrants reversal, keeping in mind that:

"But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made . . ."

". . . it is not for the courts to indulge in the business of policy making in the field of anti-trust legislation . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of congress" (*United States v. Cooper Corp.*, 312 U.S. pp. 604-606).

tions which could relate to subsequent crimes (See Point 3, *infra*).

“We recently elaborated the content of the federal standard in *Hoffman*:

‘The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result’ (341 U.S., at 486-487).

“We also said that, in applying that test, the judge must be ‘*perfectly clear*, from a careful consideration of all the circumstances of the case, that the witness is mistaken, and that the answers *cannot* possibly have such tendency to incriminate’ (341 U.S., at 488).”

Persuasive text treatment is found in 8 *Wigmore, Evidence* (McNaughton Revision, 1961) Sec. 2262, pp. 509-511:

“(b) A further question arises as to *other crimes by the witness himself*. That is, does the immunity extend to offenses to which his disclosures relate other than the one (if any) charged in the indictment or sought for in the proceeding? Here almost all depends on the words of the statute. The statute may use broad or narrow terms. Those terms must of course be taken as marking the limits, for the legislature has

power to make the immunity either larger or smaller than necessary and the only question can be what intention is expressed by the statute.

"The foregoing question, it is to be noted, may arise in one of two ways. Either the individual *has made disclosure* tending to incriminate him of some offense, is later charged with it and then pleads an immunity gained by his disclosure; or he *refuses disclosure*, alleging that it might tend to incriminate him of some separate offense not covered by the immunity and that therefore it is still privileged, the prosecution alleging the contrary and asking that an answer be compelled. At one time it could be said that the decision should be the same in whichever of these ways the question arose. However, the drastic expansion in recent years of the concept of what 'tends to incriminate' (Sec. 2260 *supra*) has shaken the symmetry. It is likely today (at least in the federal courts) *that a refusal to disclose will be upheld when there is only the remotest risk of prosecution for a crime* not covered by the immunity statute, while it is by no means clear that even a 'complete' immunity statute (see Sec. 2263 *infra*) will protect a witness from prosecution for any and every crime to which only the most fertile imaginations can relate his compelled testimony" (Emphasis supplied).

In any event, it appears that the False Claims statute does differ from the Anti-Trust Act "in a substantial way." That standard, as defined by Mr. Justice Holmes, should confirm in appellant Rutherford his right to invoke the Fifth Amendment in the 15(a) action of the United States.

Trusting that appellee will forgive the writer's plagiarizing, we turn to appellee's own memorandum submitted in the civil proceedings here, to advance the argument made here:

"There are numerous examples of conduct which run afoul of one act, without violating the other. For example, a supplier of goods to the Government who, with an intent to deceive the Government, substitutes goods of an inferior quality for the products called for by the contract specifications, violates the False Claims Act, even though such fraud would not constitute an anti-trust violation. Conversely, numerous examples of conduct which would justify recovery under Sec. 4A, but not under the False Claims Act, come to mind. Illustratively, the Government as a purchaser from a monopolist could bring an action under Sec. 4A for damages based on overcharges resulting from the unlawful monopoly. *Muskin Shoe Co. v. United Shoe Machinery Corp.*, 167 F. Supp. 106 (D. Md. 1958). An even more likely example would occur where the Government purchased from innocent distributors who were reselling products that had been the subject of price-fixing agreements between manufacturers. Unless the manufacturers were aware that the goods were to be resold to the Government (cf. *United States ex rel. Marcus v. Hess*, 41 F. Supp. 197 (W.D. Pa. 1941), *aff'd*, 317 U.S. 537 (1943)), they could not be considered to be making such a claim against the Government for payment as would bring them within the False Claims Act, although they might be found liable under Sec. 4A."

In connection with the comment on *Marcus v. Hess*, supra, we suggest that *United States v. McNinch*, 356 U.S. 595 (1958), widens the gulf of dissimilarity between the False Claims Act and the Anti-Trust Acts. Although in *Hess*, supra, the opinion strived to give the False Claims Act a certain range of applicability, *McNinch* seems as equally preoccupied with restricting the applicability of the False Claims Act. Thus, the court in *McNinch* concluded that "the False Claims

Act was not designed to reach every kind of fraud practiced on the Government" (*McNinch*, p. 599). As a consequence the requirement by the court of a specific "fraud" tends to further create the "substantial difference" between the False Claims Act and the Anti-Trust Acts.

Thus the Acts reach completely different conduct, and as the appellee has heretofore convincingly argued in the lower court, their respective coverage differs. Periods of limitation are so entirely different that unlawful conduct which may be barred under one Act may not be barred under the other. And as appellee has convincingly argued:

"The False Claims Act provides that suit 'shall be commenced within six years from the commission of the act, and not afterward,' (31 U.S.C. Sec. 235), whereas a Sec. 4A action must be commenced 'within four years after the cause of action accrued' under Section 4B of the Clayton Act (15 U.S.C. 15b). In suits under the False Claims Act, the statute is said to run from the 'time the first event of legal significance occurred—the time the defendant first became chargeable with the commission of any act prohibited by the statute.' (*United States ex rel. Nitkey v. Dawes*, 151 F. 2d 639 (7th Cir. 1945), *cert. den.* 327 U.S. 788 (1946). Further, it has been held that the limitation period is not extended by fraudulent concealment. *United States v. Borin*, 209 F. 2d 145 (5th Cir. 1954) *cert. den.* 348 U.S. 821 (1954).

"On the other hand, in damage actions under the antitrust laws, most courts hold that the statute does not begin to run until the commission of the last overt act causing the alleged damage, *Steiner v. 20th Century Fox*, 232 F. 2d 190 (9th Cir. 1956), or until the date when damages

have occurred. *Delta Theatres v. Paramount Theatres*, 156 F. Supp. 644 (E.D. La. 1958). Furthermore, the statute is tolled by fraudulent concealment. *Movietone Limited v. Eastman Kodak Co.*, 288 W. 2d 80 (2nd Cir. 1961)."

III.

Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment, for the reason that he had a substantial and reasonable cause to apprehend danger in the testimony sought to be elicited from him, because the proceedings in the civil action, evidenced by the record filed in this Court and cause, show that plaintiff United States and co-defendant Darigold not only sought, but promised to elicit testimony which had the probable and reasonable consequence of involving the witness in crimes committed subsequent to and following his testimony before the Grand Jury.

The classic statement of privilege as applicable to one who is a witness and not a defendant in criminal prosecutions, is that the witness may not be required to reveal facts which "tend to incriminate" him. To understand what those facts are which "tend to incriminate," we go to the case which first announced the authoritative and current interpretation of the Fifth Amendment. In *Blau v. United States*, 340 U.S. 159, the petitioner had been convicted of contempt for invoking the privilege when asked by a Grand Jury questions concerning her "employment by the Communist Party or intimate knowledge of its workings." That membership in that Party was lawful, *had*

seemed sufficient to the lower courts to overrule the claim of privilege. The Supreme Court was not in agreement:

“Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. The answers to the questions asked by the Grand Jury would have furnished a link in a chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act.”

If appellant Rutherford had immunity to testify in the civil action, which we deny, it could extend only to such crimes disclosed by him before the Grand Jury, which were committed on or before the date of his testimony before the Grand Jury in March, 1962. He could certainly be prosecuted for any criminal act committed after that date, regardless of the nature of the Grand Jury testimony, for immunity protects the witness from past and not subsequent acts of crime.

In *Malloy v. Hogan* (1964) 378 U.S. 1, 12 L Ed 2d 653, the defendant had been arrested and convicted of charges of pool-selling. While under sentence for the conviction he was asked to testify in an interrogation which was part of a wide-ranging inquiry into crime, including gambling. He was asked to identify the person who ran the pool-selling operation, and his refusal to so testify was sustained by the Supreme Court, which held that such disclosure of the person's name might furnish a link in a chain of evidence sufficient to connect the defendant with a more recent crime for which he could still be prosecuted.

"The conclusions of the Court of Errors, tested by the federal standard, fails to take sufficient account of the setting in which the questions were asked. Interrogation was part of a wide-ranging inquiry into crime, including gambling, in Hartford. It was admitted on behalf of the State at oral argument—and indeed it is obvious from the questions themselves—that the State desired to elicit from the petitioner the identity of the person who ran the pool-selling operation in connection with which he had been arrested in 1959. It was apparent that petitioner might apprehend that if this person were still engaged in unlawful activity, disclosure of his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted.

"Analysis of the sixth question, concerning whether petitioner knew John Bergoti, yields a similar conclusion. In the context of the inquiry, it should have been apparent to the referee that Bergoti was suspected by the State to be involved in some way in the subject matter of the investigation. An affirmative answer to the question might well have either connected petitioner with a more recent crime, or at least have operated as a waiver of his privilege with reference to his relationship with a possible criminal. See: *Rogers v. United States*, 340 U.S. 367. We concluded, therefore, that as to each of the questions, it was 'evident from the implication of the question, in the setting in which it (was) asked, that a responsive answer to the question or an explanation of why it (could not) be answered might be dangerous because injurious disclosure could result.' *Hoffman v. United States*, supra, 341 U.S. 486-487; see *Singleton v. United States*, 343 U.S. 944."

In like vein is *U.S. v. Johns-Manville Corporation* (Pennsylvania 1962) 213 F. Supp. 65. There it was pointed out that the immunity which attached because

of testimony before the Grand Jury, did not cover any conspiratorial acts subsequent to the time the testimony was given, nor would it cover a different conspiracy or other violations of the Anti-Trust Laws.

The privilege of a witness extends to all judicial or official hearings, investigations or inquiries where persons are formally called upon to give testimony. A witness accordingly has Fifth Amendment protection, not only in a judicial trial in a civil or criminal case, but in any deposition or hearing thereon. Appellant Rutherford is a court witness and not a party to the present litigation. He is subpoenaed by the Government to *contribute such information as he may have to any issue or problem before the tribunal*, not merely to win a lawsuit. And all of the courts hold that if a witness testifies *at all* in relation to a given subject, he must submit to a full, legitimate cross-examination in reference thereto. He cannot give a description of an incident and avoid testing his description by the customary techniques of cross-examination.

In the pending civil action against the two dairy companies, which are ably represented, it is certain that the co-defendant Inland Empire Dairy Association cannot be barred from the introduction of direct evidence or from questioning, as to times, events, documents, persons or other available evidence of admissible character which is deemed necessary. This action is not a duet between the United States and Carnation, with only the government prescribing the dialogue.

Appellant Rutherford, under the circumstances, has a real, and not illusory apprehension of danger in testifying in the civil case. The record in this cause clearly indicates that it is sheer conjecture to adopt an absolute, that the case will never venture past the fifty-yard line into proscribed territory because the Government says it intends not to do it, and in some way hopes that the litigants can or will do the same. Note the following:

“Mr. ETTER: I am at some quandary yet, as to the extent of the supervision of your Honor at the time of the deposition assuming there is an election and he tries to take Mr. Rutherford’s deposition again. I know I can apply for a protective order, that is true, but we are talking about immunity, we are talking about the 5th Amendment, we are talking about individual questions that they may propound at the time. Are we talking about confining any questions they ask to issues solely on the anti-trust count?”

“The COURT: Yes. If the Government is sincere, that the proof on the anti-trust count will prove the other one, they shouldn’t object to that.

“Mr. McLAUGHLIN: I have no objection to that, your Honor. Would you like to have the Government make an oral motion to that effect?”

“The COURT: No, I don’t think it is necessary.

“Mr. McLAUGHLIN: *I think the witness may need protection from cross-examination, I don’t know*” (CT 44-45) (Emphasis supplied).

In addition to the above, it is clear from examination of the deposition of appellant Rutherford taken on the 17th day of November, 1964, that matters are going to be inquired into of the witness which occurred subsequent to his testimony before the Grand

Jury, and which in all probability could furnish a vital link in a chain of evidence that could result in appellant's conviction of crime (Dep. pp. 12-20 incl.).

A brief review of the controlling opinions supports appellant's position.

Counselman v. Hitchcock, 142 U.S. 547, has been criticized on the ground, that when the Court reasons that furnishing a clue to other evidence that will incriminate is itself incriminatory, it extended the privilege beyond the traditional scope of "giving evidence against oneself." The holding, it has been said, is a far-fetched and impolitic extension. But approval of *Counselman* and the extension of the privilege was implicit in *Hoffman v. United States*, 341 U.S. 479, 488, where the Court indicated a further trend in the direction of recognizing the privilege when there is a mere possibility of danger, and yielding to the claim unless it is "perfectly clear" . . . that the witness is mistaken and that the answer "*cannot possibly*" have a tendency to incriminate. *Hoffman*, was met with approval in *Malloy v. Hogan*, *supra*, and adds weight to the assertion that the Court has approvingly cast its view again in the direction of recognizing the privilege, when there is a possibility of danger. The dissent of Justice White, concurred in by Justice Stewart, comes close to defining that direction.

Finally, although it is the privilege of an accused in a criminal prosecution not to be called or sworn as a witness at the State's instance, an ordinary witness has no such broad exemption. He is required to submit to be called and sworn by either party and to an-

swer all questions except incriminating ones. This practical difference is substantial because the ordinary witness has the burden of sifting out the incriminating questions and claiming privilege as to them. This is a difficult and trying task, further compounded by the question of waiver.

It is accepted generally, that the ordinary witness may by entering upon the story of a crime, waive his privilege against disclosure of other facts which are part of the same story. But when does waiver occur? Broadly, when the question calls for some fact that may be an essential part of a crime, or even a link in a chain of circumstantial evidence, which in the entire setting would lead the judge to believe that there was probability that the answer would endanger the witness.

Waiver is a vague and elusive standard which under varying circumstances is difficult to determine. When so many judges cannot with reasonable certainty determine the point at which waiver occurs, it is difficult to require an exact timing from a lawyer or a witness relating to that question. Appellant Rutherford should not be burdened with that onerous task.

IV.

The immunity statute considered here and pertinent to these proceedings, 15 U.S.C. Section 32, is contrary to the provisions of the Fifth Amendment to the United States Constitution, and should now be held to be unconstitutional.

We first turn to *United States of America v. William Ludwig Ullmann*, 221 F. 2d 760. Therein we find Judge Frank speaking for the Court as follows:

"It is well to add a few words about defendant's contention concerning the doctrine of *Brown v. Walker*, 161 U.S. 591, 16 S. Ct. 644, 40 L Ed 819, which held that the Fifth Amendment privilege against self-incrimination relates solely to testimony that might lead to defendant's prosecution for a crime. Defendant asks us to modify this doctrine in the light of new circumstances which have since arisen. We are not prepared to say that this suggestion lacks all merit. But our possible views on the subject have no significance. For an inferior court like ours may not modify a Supreme Court doctrine in the absence of any indication of new *doctrinal trends* in that Court's opinions, and we perceive none that are pertinent here. Accordingly, the argument must be addressed not to our ears but to eighteen others in Washington, D.C." (Emphasis supplied).

It may be that this Court will suggest that this argument too be directed to the higher court, though we perceive the indication of a new doctrinal trend in matters concerning the Fifth Amendment.

In *Ullmann*, *supra*, we direct the Court's attention to the concurring opinions:

"I concur, but regretfully. For the steady and now precipitate erosion of the Fifth Amendment seems to me to have gone far beyond anything within the conception of those justices of the Supreme Court who by the narrowest of margins first gave support to the trend in the 1890's" Clark, Chief Judge, p. 763).

"If this matter were one of first impression I could easily reach the conclusion that the immunity statute in question is in effect a circuitous attempt to circumvent the Constitution by a short-cut leg-

islative statute amending the Fifth Amendment" (Galston, District Judge, p. 763).

Ullmann v. United States, 350 U.S. 422, was decided by the Supreme Court on March 26, 1956, with Justices Douglas and Black dissenting. Therein, the Court reaffirmed *Brown v. Walker*, 161 U.S. 591, which has constantly been the stumbling block to modern critical appraisals of immunity statutes.

We turn back from *Ullmann*, supra, to *Boyd v. United States*, 116 U.S. 616. Information was filed on behalf of the United States which sought the forfeiture of property alleged to have been fraudulently imported without the payment of duties. On motion of the Government, pursuant to an Act of 1874, the District Court ordered the production of certain records. The defendant, after objecting to the constitutionality of the 1874 Act, produced the records but unsuccessfully objected to their receipt in evidence. There was a judgment of forfeiture, but the Supreme Court reversed the judgment of the lower courts and decided that, "a witness . . . is protected by the law from being compelled to give evidence that tends to incriminate him, or to subject his property to forfeiture" (p. 638).

In *Boyd* we note the following:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, mainly, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives

them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon" (116 U.S. at 365).

Thereafter followed *Counselman v. Hitchcock*, 142 U.S. 547, which was the first Supreme Court case to deal with the validity of an immunity statute designed to displace the protection afforded by the constitutional privilege of the Fifth Amendment. A shipper was asked to testify before a Grand Jury as to alleged rebates given to him by a group of railroads in violation of the Interstate Commerce Act. The shipper refused to give such testimony despite the immunity statute, and the Supreme Court unanimously sustained the witness' refusal, asserting that the immunity did "not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard . . ." (142 U.S. at 585-586, and see *supra* this brief p. 35). And the Court further asserted that "we are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States" (p. 585).

Following *Counselman v. Hitchcock*, *supra*, a new immunity statute had been passed apparently as the result of criticism of the court's opinion. *Brown v. Walker*, *supra*, which followed upon the heels of the passage of the new immunity statute involved a Grand Jury investigation into alleged rebates in vio-

lation of the Interstate Commerce Act, as before, but the witness was the auditor of the railroad company and presumably had nothing to do with granting the rebates. In any event, and despite the immunity statute, the witness refused to answer questions relating to the rebates alleging that his answers would tend to accuse and incriminate him. He was directed to answer by the lower courts, while thereafter a majority of the Supreme Court also concurred against him. Since *Brown v. Walker*, supra, the courts have been inclined generally to treat that opinion as decisive.

It is of more than passing interest to note that *Brown v. Walker*, supra, was decided by a vote of five to four, and that the opinion was written by Mr. Justice Brown, the most recent appointee of the court which had decided *Counselman v. Hitchcock*. Between the date of that decision and *Brown v. Walker*, there had been numerous changes in the composition of the Court. Justice Bradley, who had written the opinion of the Court in *Boyd v. United States*, supra, and who also participated in *Counselman*, supra, had died shortly after the decision in that case was handed down. Four of the six justices who had decided *Counselman* joined the majority in *Brown v. Walker*, while two new justices, Shiras and White, joined in the *Walker* dissent. In the dissent written by Justice Shiras we find:

“The constitutional privilege was intended as a shield for the innocent as well as for the guilty. A moment’s thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to

disclose facts and circumstances known only to himself, but which, when once disclosed, he may be entirely unable to explain as consistent with innocence.

"But surely no apology for the Constitution, as it exists, is called for. The task of the Courts is performed if the Constitution is sustained in its entirety, in its letter and spirit."

Now at the time of the decision in *Ullman*, supra the justices of the Supreme Court were Warren, Black, Douglas, Clark, Harlan, Burton, Frankfurter, Reid and Minton.

We note that change has since occurred in the trend of the Court's opinions. See *Malloy v. Hogan*, supra, *Murphy v. Waterfront Commission*, 378 U.S. 52, 12 L Ed (2d) 678, Due process and Search and Seizure Cases. In *Malloy v. Hogan*, the justices were Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Goldberg. Mr. Justice Goldberg has since been replaced by Mr. Justice Fortas, but it is a distinct probability that the dissenting opinion of Justices Black and Douglas in *Ullman* could well become the majority opinion, if addressed to the Court as now constituted. (See an excellent analysis of Immunity Statutes, *Columbia Law Review*, Vol. 57, p. 500, April 1957 "*Reflections on Ullmann v. U.S.*")

We submit that the constitutional grants to the individual should receive continuing support in the courts. And there is evident in judicial opinion the realization that there is responsibility to strengthen, not weaken the Constitution.

Immunity statutes continue to cloud the protection of the Fifth Amendment and to render its great meaning uncertain and vacillating.

We submit that reversal should be had in this case. It is demanded by the needs and necessities of our times and by the most persuasive of judicial precedents.

Stare decisis should not be invoked to preserve questionable constitutional interpretation, for what may be asserted to be precedent here, has never gone unquestioned or received a unanimity of approval. On the contrary, criticism of immunity statutes continues to grow.

“That a deliberate or solemn decision of a court or judge made after argument on a question of law fairly arising in a case and necessary to its determination is an authority or binding precedent in the same court or in other courts of equal or lower rank in subsequent cases where ‘the very point’ is again in controversy; but that the degree of authority belonging to such a precedent depends of necessity on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law; and that the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual rather than arbitrary or inflexible” (Daniel H. Chamberlain *THE DOCTRINE OF STARE DECISIS*, New York, Baker-Voorhis & Co. (1885).

* * * * *

“The conclusion of the majority of the court, whether right or wrong, is interesting as evidence of a spirit and tendency to subordinate precedent to justice. How to reconcile that tendency, which is a growing and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day. We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the

present, the path of safety will be found" (Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS*, Yale Univ. Press (1942), 149).

CONCLUSION

We submit to the Court that the certification and order of the District Court could be reversed, solely on Point 1. We are of the opinion, however, that in addition to the first point discussed, reversal is equally warranted on the basis of the argument submitted in support of points 2, 3 and 4.

Respectfully submitted,
 R. MAX ETTER,
Attorney for Appellant

CERTIFICATE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. MAX ETTER

No. 20377

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. RUTHERFORD, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS
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No. 20377

ROBERT E. RUTHERFORD, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

STATEMENT AS TO JURISDICTION

This is an appeal from an order of the district court holding appellant in contempt for refusing to testify in a pending government civil suit, United States v. Carnation Co. et al., Civil No. 2297, in the Eastern District of Washington. The contumacious conduct took place in a deposition proceeding in which appellant was subpoenaed by the government, and followed the court's denial of appellant's claim of privilege against self-incrimination based upon his assertion that his prospective testimony was not within the scope of the antitrust immunity statute, 15 U.S.C. 32. The

district court has jurisdiction of the government's suit under the False Claims Act (31 U.S.C. 231-233) and under Section 4A of the Clayton Act (15 U.S.C. 15a). The contempt order was entered on June 24, 1965, and the notice of appeal was filed on July 2, 1965. This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

The essential facts of this case are not in dispute. Appellant is an employee of Carnation Company of Washington, a distributor of milk and milk products. In March 1962, Rutherford testified before a grand jury in the Eastern District of Washington which returned an indictment (R. 1-7) charging Carnation, Inland Empire Dairy Association, and an official of Inland with a conspiracy in violation of the Sherman Act in the sale of milk and milk products to Fairchild Air Force Base in Washington.^{1/} Defendants were charged with fixing prices, allocating the business between Carnation and Inland, and submitting "noncompetitive, collusive and rigged bids for contracts to supply milk and other milk products to Fairchild" (R. 5). On

1/ United States v. Carnation Company of Washington, et al., Criminal No. 8752, Eastern District of Washington, Northern Division. The indicted Inland official, J. M. Click, had testified before the grand jury but had done so under an express waiver of his immunity from prosecution. Rutherford had not made such waiver, and received immunity as a result of his grand jury testimony (R. 28). According to the government's response to defendants' interrogatories, Rutherford and Click were the company officials who communicated with each other about the bids for the Fairchild business, prior to their submission, in pursuance of the conspiracy.

August 16, 1962, the defendants were convicted upon their pleas of nolo contendere; Carnation and Inland were each fined \$20,000, the Inland official was fined \$2,500 (R. 8-10).

Shortly thereafter, on August 28, 1962, the United States filed the pending civil case against Carnation and Inland, seeking damages under the False Claims Act and under the Clayton Act (R. 11-22), resulting from the same conspiracy attacked in the criminal case. Both civil causes of actions allege conspiracies with regard to sales of milk and milk products to Fairchild beginning before July 1956 and up to December 31, 1960 (R. 5, 10). Under the False Claims Act, it is asserted that Carnation and Inland defrauded the United States by denying it the right and duty to let contracts for the sale of milk and milk products to Fairchild by means of competitive bidding; while keeping up the appearance of competition, defendants secretly allocated the business and submitted "noncompetitive, collusive and rigged bids" (R. 15-19). Under the Clayton Act, it is asserted that defendants agreed to fix prices on sales of milk and milk products to Fairchild, to allocate that business between them and "[t]o submit noncompetitive, collusive and rigged bids" for such contracts (R. 20-22).

In November 1964, the government subpoenaed appellant Rutherford for the purpose of taking his pretrial deposition testimony on

^{2/}
November 17, 1964. At that time, appellant refused to answer questions posed by counsel for the government concerning the alleged conspiracy and invoked the Fifth Amendment privilege against self-incrimination. Rutherford maintained that position despite the statement of government counsel that the witness had immunity and should answer the questions posed (Deposition of Robert E. Rutherford, pp. 2-4). Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, the United States then moved for a court order compelling the witness to testify on the ground that he was protected by the antitrust immunity statute, 15 U.S.C. 32.

On February 3, 1965, prior to this Court's opinion in Kronick v. United States, 343 F. 2d 426, the district court denied the government's motion, holding that 15 U.S.C. 32 did not apply to appellant's testimony in the pending civil suit because one of the counts was not brought under the antitrust laws, but under the False Claims Act (R. 28-33). Following the Kronick decision, the government moved for reconsideration by the district court (R. 34-35). Upon reconsideration, the district court ruled that the Kronick case was dispositive and required setting aside the

2/ Prior thereto, Rutherford had been subpoenaed by defendant Inland. His refusal to testify in response to that subpoena on the ground that he was not protected by the immunity statute had been sustained by the district court (R. 24-25).

previous order; the court held that Rutherford would obtain complete immunity under 15 U.S.C. 32 for testimony in the deposition and ordered him to testify (R. 41-49). The district judge required the deposition to be in open court so that he could rule upon the materiality of the questions to the antitrust cause of action (R. 42).

Appellant was then again subpoenaed by the government for the purpose of taking his deposition testimony (R. 47). This hearing took place on June 23, 1965. Upon Rutherford's continued refusal to answer the questions propounded, the district court held him in contempt of court. In his order, Judge Powell certified that he "saw and heard the conduct constituting the contempt . . . and that it was committed in the actual presence of the Court" (R. 50-52; Transcript, June 23, 1965). The order sentenced appellant to imprisonment for a term of 90 days, but suspended execution of the sentence pending appellate review, with the additional provision that in the event the order is sustained on appeal Rutherford "shall be afforded an opportunity to purge himself of said contempt" within 60 days from the affirmance (R. 52).

ARGUMENT

The issue on this appeal is whether the pending government suit, United States v. Carnation Co., et al., is a "proceeding" or "suit" under the antitrust laws within 15 U.S.C. 32, so that appellant Rutherford will obtain immunity from prosecution with regard

to any matter about which he testifies. If the answer is yes, as we believe it is, District Judge Powell correctly directed appellant-- a crucial government witness--to testify and held him in contempt for refusing to do so.

It should be noted that Rutherford has already testified once, in the grand jury investigation which led to the indictment and conviction of Carnation Co. (his employer) and others upon essentially the same charges involved in the present case. Rutherford's prior testimony has admittedly given him immunity from prosecution under 15 U.S.C. 32; and, since the grand jury hearing took place in March 1962, and the pending civil complaint alleges conduct ending December 31, 1960 (R. 15, 20), it is probable that the existing immunity is sufficient to protect him. However, because appellant may be asked about subsequent events as a matter of corroboration, or upon cross-examination, the court below properly passed upon the applicability of the immunity statute to the pending civil suit.

On the merits, appellant fails to discuss, or cite, this Court's recent opinion in Kronick v. United States, 343 F. 2d 436, upon which District Judge Powell expressly relied in adjudicating the contempt. Kronick, like the present case, involved the refusal of a witness to testify in a civil action for damages brought by the United States under the Clayton Act and for fraud, and raised the adequacy of the immunity from prosecution provided by 15 U.S.C. 32. The Court's

decision affirming the contempt implicitly and correctly assumed, contrary to appellant's argument here, that a government suit for damages under the antitrust laws is one to which the antitrust immunity statute applies (Point I, infra). The Court in Kronick expressly resolved another issue presented on this appeal, holding that 15 U.S.C. 32 provided adequate immunity from future prosecution notwithstanding the coupling of the antitrust claim for damages with one for fraud arising out of the same facts (Point II, infra).

Appellant's further contentions that the immunity which he has already received for testifying before the grand jury is not adequate (Point III) and that the immunity statute is unconstitutional (Point IV) are plainly without merit.

I

A GOVERNMENT ACTION FOR DAMAGES UNDER THE
ANTITRUST LAWS IS A "PROCEEDING" OR "SUIT"
UNDER SUCH LAWS WITHIN 15 U.S.C. 32, SO THAT
PERSONS TESTIFYING THEREIN RECEIVE IMMUNITY
FROM PROSECUTION

The antitrust immunity statute, as presently codified in 15 U.S.C. 32 provides:

No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title [the Sherman Act] and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title [Wilson Tariff Act]; Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. 3/

3/ Act of February 25, 1903, c. 755, §1, 32 Stat. 904, 15 U.S.C. 32.

The plain terms of that act show that it applies to government actions for damages under the antitrust laws, i.e., the second count in the present complaint, and that a witness testifying in such suit obtains immunity from prosecution. A government action for damages based upon violations of the Sherman Act is brought under Section 4A of the Clayton Act of 1914, as added in 1955, 69 Stat. 282, 15 U.S.C. 15a. In the language of 15 U.S.C. 32, the Clayton Act is plainly "amendatory . . . and supplemental" to the Sherman Act ^{4/} and a government damage action of course falls within "any proceeding, suit or prosecution" under such law as much as a government civil action for injunction, concededly covered by the immunity provision. Since a witness in such suit obtains full immunity, there is no risk of self-incrimination and he can be compelled to testify.

Appellant, however, asserts that the immunity granted under 15 U.S.C. 32 does not apply in a civil damage suit by the United States. It points out that the language now in Section 32 was enacted as a proviso to an appropriation measure which provided \$500,000 "for the enforcement" of the Sherman Act and other laws, to be spent by the Department of Justice "to conduct proceedings, suits,

^{4/} The Clayton Act was explicitly designated by Congress as , "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", with specific reference to the Sherman Act, 38 Stat. 730.

or prosecutions under said Acts in the Courts of the United States."^{5/}
Its syllogism is that civil damage suits are not for the purpose of
"enforcing" the antitrust laws but for compensating the United
States (Br. 19-20); Section 32 applies only to proceedings for the
"enforcement" of the antitrust laws (Br. p. 15); and it concludes,
therefore, that the immunity provision does not apply here.

Appellant's reasoning is unsound. The term "enforcement" of
the 1903 Appropriations Act is not language of limitation. Rather,
it characterizes all acts of the Department of Justice in bringing
criminal and civil proceedings under the antitrust laws. The gov-
ernmental responsibilities for antitrust enforcement are unitary,
and cannot be divided between criminal and civil proceedings, or
between injunction and damage suits. This has been acknowledged,
for example, in decisions sustaining the right of the Department
of Justice to use grand jury evidence in civil damage cases as well
as in injunction suits and criminal prosecutions (United States v.

^{5/} The original 1903 Act provided as follows:

That for the enforcement of the provisions of the [Interstate
Commerce] Act * * *, * * * the [Sherman] Act * * * and * * *
[the antitrust provisions of the Wilson Tariff] Act, * * *
the sum of five hundred thousand dollars * * * is hereby
appropriated, * * * to be expended under the direction of the
Attorney General * * * to conduct proceedings, suits, and
prosecutions under said Acts in the courts of the United
States: Provided, That no person shall be prosecuted or sub-
jected to any penalty or forfeiture for any or on account of
any matter concerning which he may testify or produce evidence,
documentary or otherwise, in any proceeding, suit or prosecution
under said Acts * * *.

General Electric Co., 209 F. Supp. 197, 199 (E.D. Pa.); In re Petroleum Industry Investigation, 152 F. Supp. 646 (E.D. Va.)). On the same theory, the intent of Congress in the antitrust immunity statute, to enable the Attorney General to obtain testimony by offering immunity from prosecution, Heike v. United States, 227 U.S. 131, 142, is not limited to particular classes of actions but applies to all government "proceedings, suits, or prosecutions" under the antitrust laws, and therefore includes a damage suit under Section 4A of the Clayton Act.

Since appellant places such heavy emphasis upon the meaning of the term "enforcement", it is well to note that Congress recognized the important enforcement effect of government antitrust damage suits, when it authorized such actions in 1955. S. Rep. 619, 84th Cong., 1st Sess., p. 3 (infra, p.13). And it has since that time continued to designate the Antitrust Division appropriation as one "for the enforcement" of the antitrust laws (e.g., Appropriations Acts for fiscal years 1964 and 1965, 77 Stat. 782, 78 Stat. 717), thus demonstrating its understanding of the role of government damage suits in the antitrust program. Congress realizes that fines in criminal cases are limited to a maximum of \$50,000 and that damage recoveries play the essential role of taking the profit out of law violations. Damage recoveries often far exceed

the amount of the fines imposed and, indeed, we believe they will
in this case.^{6/}

Further, appellant's assertion that 15 U.S.C. 32 applies to all government antitrust proceedings except civil damage suits is rebutted by the legislative histories of the immunity provision, and of Section 4A of the Clayton Act.

An immunity statute was proposed as early as 1900, only a decade after enactment of the Sherman Act. At that time a House Committee reported to Congress that administration of the Act was "deemed insufficient" to deter violations, and it recommended, among other things, that immunity be granted in all "prosecutions, hearing, and proceedings under the provisions of this act, whether civil or criminal . . ." (H. Rep. 1506, 56th Cong., 1st Sess.). The Committee pointed out it was "extremely difficult to establish the existence of combinations or conspiracies" without the testimony or papers of persons "who are guilty parties thereto," and who can

6/ Defendants Carnation and Inland were each fined \$20,000 in the criminal case. As stated in response to defendants' interrogatories, the government seeks damages of about \$296,000 on its antitrust claim, or about \$696,000 in double damages and forfeitures under the False Claims Act. In the famous electrical equipment price-fixing conspiracy, General Electric Co. was fined a total of \$437,500 on 19 convictions; it settled the government claims for damages for \$7,470,000. While private treble damage suits also have an enforcement effect, and were so intended by Congress (Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-752), it is clear that the immunity provision of 15 U.S.C. 32 does not apply to testimony given in the course of them. H. Wagner & Adler Co. v. Mali, 74 F. 2d 666, 670 (C.A. 2); United States v. Standard Sanitary Mfg. Co., 187 Fed. 232 (E.D. Pa.). This is not, however, because of any distinction between damage and other suits. It is because Congress intended the immunity provision as a special tool of government enforcement to be utilized only by the Attorney General as shown by [Note continued next page.]

claim upon their Fifth Amendment privilege to withhold such evidence; the immunity provision was suggested as having "great utility in aiding in effectively enforcing all of the provisions of the Act" (id. at p. 2; 33 Cong. Rec. 6478).

When the immunity provision was enacted in 1903, along with the first appropriation specially earmarked for antitrust enforcement, it was again explained that immunity was needed to give the government "the means to secure the necessary proof" to establish the existence of illegal conspiracies (36 Cong. Rec. 411-419). Appellant protests that the 1903 Act "gives not a hint that immunity was to be given in a Section 15(a) civil suit by the United States" (App. Br. 16). At that time, of course, there was no specific provision in the law for government damage suits. But the immunity statute's operative language is sweeping; as noted it applies to all "proceedings, suits or prosecutions" under the antitrust laws. This breadth itself refutes any intent to limit the scope of the law to exclude any class of government suit then or later authorized. The assertion by a key witness of the privilege against self-incrimination poses common problems in all government antitrust proceedings and Congress was plainly concerned that all types of government antitrust proceedings be successful.

6/ [Footnote continued]

the context of the 1903 Act and by the legislative history subsequently set out (see also cases ibid.).

In 1955, Congress enacted Section 4A of the Clayton Act, 15 U.S.C. 15a, expressly to authorize government civil damage suits after the Supreme Court had held that the government could not sue under the existing law (S. Rep. 619, 84th Cong., 1st Sess., p. 3; H. Rep. 422, 84th Cong., 1st Sess., p. 3; see United States v. Cooper Corp., 312 U.S. 600). In so doing, Congress made several explicit distinctions between government damage suits and others, making inapplicable to the former the provisions for prima facie effect and tolling of statute of limitations (See Section 5 as amended in the same 1955 bill, 69 Stat. 283, 15 U.S.C. 16). It is apparent that if Congress had intended to prevent the applicability of the unambiguous language of the immunity provision to damage suits, it would have done so in similar express terms. Moreover, since, as already noted, Congress stressed the enforcement and deterrent aspect of government damage suits, along with the desirability of redressing the government's pecuniary losses, no hidden intent to modify the law may be inferred.

Accordingly, the enforcement aid provided by the immunity provision applies in this case. Appellant Rutherford can be compelled to testify, as he has already once been compelled before the grand jury, and the government damage suit should proceed without further unwarranted delay.

II

THE ANTITRUST IMMUNITY STATUTE WILL APPLY TO ALL OF APPELLANT'S TESTIMONY IN THE PENDING CASE OF UNITED STATES v. CARNATION CO., IN WHICH THE GOVERNMENT'S ANTITRUST CLAIM IS JOINED WITH ONE FOR FRAUD ARISING OUT OF THE SAME FACTS

We have shown that the antitrust immunity statute, 15 U.S.C. 32, applies to testimony given in government damage suits under the antitrust laws. The pending case of United States v. Carnation Co., in which appellant was directed to testify, is such a suit. Appellant contends, nevertheless, that the antitrust immunity provision does not protect him against subsequent prosecution because the antitrust cause of action in the government's complaint is joined with a cause of action under the False Claims Act, to which the immunity statute is inapplicable (Br. p. 24). Such a contention was explicitly rejected by this Court in the recent case of Kronick v. United States, 343 F. 2d 436. In that case, as here, the government asserted a claim under the antitrust laws and a claim under a fraud statute,^{7/} based upon a single course of conduct. The Court

^{7/} In this case, the non-antitrust claim is under the False Claims Act, 31 U.S.C. 231, while in Kronick it was under the Federal Property and Administrative Services Act of 1949, 49 U.S.C. 489. Both of these acts cover frauds against the United States and prescribe the assessment of liquidated damages in similar terms, a fixed sum per violation plus double damages. The statute in Kronick is limited to fraud in the disposal of government property and other specified transactions, while the False Claims Act is the Civil War statute which covers generally the presentation of "false, fictitious or fraudulent" claims to the government and conspiracies to defraud the United States by such claims. The similarity of these statutes has been noted (see Rex Trailer Co., Inc. v. United States, 350 U.S. 148, 152, commenting on predecessor of the 1949 statute).

held unequivocally that any claim that the antitrust immunity statute was inapplicable because of the presence of the non-antitrust claim "would be without merit" (343 F. 2d at 441). As the Court declared (ibid.):

The proof necessary to sustain both claims is substantially identical Under these circumstances it must necessarily be assumed that all of his testimony is germane to the antitrust claim and is therefore protected by section 32.

This language precisely covers the present case and disposes of appellant's contention. The antitrust and False Claims Act counts are sufficiently distinct in law so that both may be asserted, as we argued below (quoted in App. Br. 28, 29-30). However, the claims are clearly alternative characterizations of the same course of conduct (and the government would ultimately recover only under one of them). This is apparent from the allegations of the complaint. The antitrust claim charges an agreement to fix prices and to submit noncompetitive, collusive, rigged bids on the sale of milk and milk products to Fairchild Air Force Base (R. 20-21). The defendants' submittal of these noncompetitive, collusive and rigged bids, while representing that they were competitive bidders, also constituted the fraud which is alleged to have violated the False Claims Act (R. 15-19). Plainly, all the testimony sought by the government from Rutherford will be relevant to the antitrust claim and 15 U.S.C. 32 will provide him with immunity from prosecution for any

crime about which he testifies or to which his testimony leads.^{8/}

The court below properly directed Rutherford to testify on deposition and held him in contempt for refusing to do so, see F.R. Civ. P. 37(a), (b), F.R. Crim. P. 42(a).

III

SINCE APPELLANT WILL RECEIVE IMMUNITY FROM PROSECUTION FOR ANY CRIMES RELATED TO HIS FUTURE TESTIMONY IN THE PENDING CASES, THE SCOPE OF IMMUNITY RESULTING FROM HIS PRIOR GRAND JURY TESTIMONY IS IRRELEVANT

Appellant argues that, in the pending civil case, he may be asked questions which would involve him "in crimes committed subsequent to and following his testimony before the Grand Jury" (Br. 30). On that ground, he fears that the immunity with which he is clothed from his grand jury appearance would not protect him.

But the point of the decision below, and of our argument thus far, is that appellant's testimony in the pending civil case will give him a new and independent immunity under 15 U.S.C. 32. This additional immunity will, of course, be commensurate with the scope

8/ This case, therefore, does not present the problem which would be encountered if a government antitrust claim were joined with a non-antitrust claim arising from different facts. In such a situation, a witness would be entitled, at the least, to immunity with regard to any testimony arguably relevant to the antitrust claim, and to an adequate warning when the questioning leaves the antitrust issues so that he may assert his privilege against self-incrimination. Cf. Brown v. Walker, 161 U.S. 591, 605; United States v. Monia, 317 U.S. 424, 427; United States v. Onassis, 125 F. Supp. 190 (D. D.C.). In the present case, no such distinctions are necessary since all the relevant facts relate to the antitrust claim, covered by 15 U.S.C. 32.

of his forthcoming testimony in the civil case (Heike v. United States, 227 U.S. 131; United States v. Monia, 317 U.S. 424). The scope of his prior grand jury evidence is irrelevant to appellant's obligation to testify under the order below.

IV

THE ANTITRUST IMMUNITY STATUTE IS CONSTITUTIONAL

Appellant finally urges that the antitrust immunity statute is contrary to the Fifth Amendment's privilege against self-incrimination and "should now be held to be unconstitutional" (Br. 36). The Supreme Court, however, has consistently sustained immunity provisions in the form of 15 U.S.C. 32. Ullmann v. United States, 350 U.S. 422; McCarthy v. Arndstein, 266 U.S. 34, 42; Heike v. United States, 227 U.S. 131, 142; Brown v. Walker, 161 U.S. 591. While appellant terms Brown v. Walker as the "stumbling block to modern critical appraisals of immunity statutes" (Br. p. 38), the Supreme Court has unequivocally adhered to its approach. As Mr. Justice Frankfurter stated in Ullmann (350 U.S. at 437-438):

Since that time the Court's holding in Brown v. Walker has never been challenged; the case and the doctrine it announced have consistently and without question been treated as definitive by this Court, in opinions written among others, by Holmes and Brandeis, JJ.

Since appellant's risk of self-incrimination by testimony in the pending case of United States v. Carnation Co. has been eliminated by the immunity afforded under 15 U.S.C. 32, the court below properly directed him to testify.

CONCLUSION

Accordingly, the judgment below, that appellant Rutherford was in contempt of court for refusing to testify in the pending case of United States v. Carnation Co., et al., Civil No. 2297 (E.D. Wash.), should be affirmed.^{9/}

Respectfully submitted.

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Assistant Attorney General,

LIONEL KESTENBAUM,
JOHN T. MARSHALL,
Attorneys.

DECEMBER 1965

9/ Our conclusion is not affected by the recent Supreme Court decision in Harris v. United States, No. 6, O.T. 1965, December 6, 1965, 34 U.S. Law Week 4040. In that case, the Court held that contempt of a grand jury could not be punished summarily by a district judge under F.R. Crim. P. 42(a), as a contempt occurring "in the actual presence of the court" but had to be proceeded on notice and hearing under F.R. Crim. P. 42(b). In Harris, the district court had found an immunity statute applicable, rejected the witness' claim of Fifth Amendment privilege and directed him to answer in the court's presence. Justice Douglas stressed that "[t]he real contempt, if such there was, was contempt before the grand jury" and the judge's repeating of the questions served no purpose except to make summary contempt available when there was no need for swiftness (p. 3). Here, however, the deposition proceeding was properly before the district judge, the court having directed it to be in open court so that he could make immediate rulings upon the relevance of the questions to the antitrust claim, R. 42, F.R. Civ. P. 28. This was the judge's proceeding, and the contempt before him could be punished summarily, F.R. Civ. P. 37(a), (b)(1), F.R. Crim. P. 42(a).

It should be noted, moreover, that Rutherford has already had a hearing on the relevant question of immunity, under the procedures of Federal Civil Rule 37(a) and that Judge Powell has lessened the punitive aspect of his order by assuring the witness an opportunity to purge himself of the contempt after the appeal is resolved, R. 52; Transcript, June 23, 1965, p. 24.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT E. RUTHERFORD,	}	No. 20377
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,		
<i>Appellee.</i>		

*Appeal from a judgment of the United States District
Court for the Eastern District of Washington,
Northern Division*

HONORABLE CHARLES L. POWELL, *Judge*

APPELLANT'S REPLY BRIEF

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WILSON, Clerk

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APPELLANT'S REPLY BRIEF

STATEMENT

The Government contends that the term "enforcement" in the 1903 Appropriations Act is not language of limitation, and accordingly 15 U.S.C. 32 applies to all Government "proceedings, suits, or prosecutions" under the anti-trust laws, including a damage suit under Section 4(a) of the Clayton Act (15 U.S.C. 15(a)).

It is recited that in 1900 the House Committee recommended immunity be granted in all "prosecutions, hearing and proceedings under the provisions of this Act, whether civil or criminal . . ." and that the subsequent enactment of the immunity provision in 1903, though it failed to extend immunity to "prosecutions, hearing, and proceedings under the provisions of this Act, whether civil or criminal . . .", nevertheless showed a concern of Congress that all types of Government anti-trust proceedings be successful. The argument nowhere analyzes or refutes, the legislative history recited in appellant's opening brief.

Nor do we think that *Kronick v. United States*, 343 F. 2d 426, answers appellant's claim that immunity under 15 U.S. 32 does not extend to proceedings which differ from an anti-trust damage action, in material and substantial requirements of proof. This Court's language in *Kronick* must necessarily be limited to the footnoted issue suggested by the Government in its brief in *Kronick* (Footnote 7, p. 13—Government Brief *Kronick*). Furthermore, if the question of Grand Jury immunity is irrelevant in this civil proceeding, surely the disclosure of conduct which might divulge a link leading to proof of different or separate crimes subsequent to the period involved in the civil case, is not protected by immunity.

ARGUMENT

POINT I.

In its statements directed against appellant's Point I the Government seeks to buttress a policy argument to the effect, that Congress having exhibited a concern

that anti-trust proceedings be successful, must have intended that the term "enforcement" should mean the same thing in degree and measure as applied to all actions of the Government, criminal, equitable, or for damages. This argument fails for two reasons. In the first place, it is cast in the same mold as the contention urged by the Government in *United States v. Cooper Corporation*, 312 U.S. 600, when it contended that United States was a "person" within the meaning of Section 7 of the Sherman Act. And the comment of the Court in denying the contention is sufficient comment here:

"The Government admits that often the word 'person' is used in such a sense as not to include the sovereign, but urges that where, as in the present instance, *its wider application is consistent with, and tends to effectuate, the public policy evidenced by the statute*, the term should be held to embrace the Government. And it strongly urges that all the considerations which moved Congress to confer the right to recover damages upon individuals and corporations injured by violations of the Act apply with equal force to the United States which, as a large procurer of goods and services, is as likely to be injured by the denounced combinations and monopolies as is a natural or corporate person. *We are asked, in this view, so to construe the Act as not to deny to the Government what public policy is thought to require*" (312 U.S. p. 605). (Emphasis supplied).

Government's argument for extending immunity, based upon the legislative history recited in its brief, contains a reverse twist. It suggests, in support of its position, a legislative history which plainly shows that the Congress with full opportunity to grant immunity in a damage action by the Government failed to do so.

And keeping in mind that recitation of early legislative history, enactment in 1955 of the statute giving the United States the right to recover actual damages in a civil action without mention of immunity, does not imply such a grant. In the light of the courts' aversion, without most compelling reasons, to approve statutes of immunity, it cannot be assumed that implied immunity is favored here (Appellant's Opening Brief, p. 36, et seq.).

To apply the same precise meaning and scope to the term "enforcement" is to torture the distinctions and meanings clearly indicated in the usage of the word, in legislative history, judicial opinion and common everyday parlance. In *United States v. General Electric Co.*, 209 F. Supp. 197, where the Court noted the problem of whether or not a civil damage suit by the Government was a *form* of enforcement action, we find the following:

"Passing the question whether a civil damage suit by the Government is not itself *a form* of enforcement action—as to which, see *United States ex rel Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379, 87 L Ed 443 (1943)—the duties of Government attorneys are by no means *limited to enforcement proceedings*. The attorneys for the Government in these actions are authorized by statute, to conduct 'any kind of legal proceeding, civil or criminal,' in which the United States is a party in interest. 5 U.S.C.A. Sec. 310. *On principle, it would seem that the United States is no less interested in recouping losses suffered from violations of its laws than in the enforcement of the same laws*" (p. 199) (Emphasis supplied).

And in *United States v. Cooper Corp.*, 312 U.S. 600:

"In the final analysis, it is probably true that even an Attorney General who might zealously de-

sire to *enforce* the criminal provisions of the Sherman Act would not likely be stimulated to institute civil proceedings for damages unless his attention was directed to the point by keenly alert and diligent purchasing agencies" (Dissent, p. 618) (Emphasis supplied).

United States urges that statutory immunity, 15 U.S.C. 32, should extend to all actions that the term "enforcement" connotes. Such a contention is patently unsound. For example we find in the legislative history of the Government damage statute the following:

"At the time of the enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of *enforcement* and thus save the Government time and money" (*U.S. Code, Congressional and Administrative News, 84th Congress (1955) Vol. 2, p. 2329*) (Emphasis supplied).

* * * * *

"Enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Sec. 7 of the Sherman Act had not successfully stimulated private litigation for *enforcement* of the Sherman Act (p. 2330) (Emphasis supplied).

* * * * *

... "The damages of 'persons' are trebled so that private persons will be encouraged to bring actions which, though brought to *enforce* a private claim, will nonetheless serve the public interest in the *enforcement* of the anti-trust laws" . . . (p. 2330) (Emphasis supplied).

Turning now to Section 7 of the Sherman Act (amended as 15 U.S.C. 15), we find it to be:

"An action to recover damages under the anti-trust laws is a civil and not a penal action—a civil action for a private injury, compensatory in its purpose and effect (Toulmins Anti-Trust Laws, Section 16.6, Vol. 6, p. 393).

Can it be argued that had the dissenting opinion in *Cooper*, supra (Justices Black, Reed, Douglas), been the majority opinion, the statutory immunity of 15 U.S.C. 32 would extend to witnesses for the Government, but be denied to the witnesses of private litigants? The answer must be "no." In providing legislation for the purpose of permitting the Government to sue for damages, the Congress did no more than remedy the failure of Section 7 of the Sherman Act, to grant the United States the right to sue for damages, in addition to "any person." It did not extend immunity in the Government's criminal and equitable proceedings to the damage action.

"The United States is, of course, amply equipped with the criminal and civil process with which to enforce the anti-trust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered." (U.S. Code, Congressional Administrative News, 84th Congress (1955), Vol. 2, p. 2330) (Emphasis supplied).

And see *United States v. Cooper*, supra, p. 606:

"Congress has not left us at large to devise every feasible means for protecting the Government as a purchaser. It is the function of Congress to fashion means to that end, and Congress has discharged this duty from time to time according to its own wisdom. Our function ends with the endeavor to ascertain from the words used, construed

in the light of the relevant material, what was in fact the intent of Congress" (Emphasis supplied).

The Government here is "confounding" powers of the United States as a sovereign with its rights as a "body politic," or more simply as a "buyer of goods":

"Long ago this Court said, 'a man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance to be twice punished for the same offense.' (Citation) Congress has 'power to give an action for damages to an individual who suffers by breach of the law' (Citation). And it has this same power when it, rather than some private individual is injured by a fraud. *Quite aside from its interest as preserver of the peace, the Government when spending its money has the same interest in protecting any citizen from frauds which may be practiced upon him. 'The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection'* (Citation) (*United States of America ex rel Marcus v. Hess*, 317 U.S. 537, 549, 550) (Emphasis supplied).

POINT II.

Appellant makes no claim that the anti-trust immunity provision is inoperative solely because the anti-trust cause of action in the Government's complaint is joined with a cause of action under the False Claims Act. Rather, appellant urges that proof required to establish violations of the False Claims and Anti-Trust statutes is materially and substantially different. Thus

testimony in a 15 U.S.C. 15(a) action differs wholly in a substantial way from the specific fraud requirements necessary to establish proof of a false claim.

Kronick v. United States, 343 F. 2d 436, did not touch this argument in the fact posture of that case. Thus:

“The thrust of Kronick’s argument on this appeal is that under the unique circumstances of this case he had reasonable cause to apprehend danger if he answered the questions propounded of him at the trial of the civil action, and that the district court erred in holding to the contrary.

“The only danger which Kronick claimed to apprehend was that he would be prosecuted for perjury if he testified in the civil action contrary to his testimony in the prior criminal action” p. 440).

So even if the District Judge erred (CT pp. 30-31), in holding that the civil suit was not an anti-trust action since the First Count of the Complaint was based on the False Claims Act with consequent loss of immunity, we have not adopted either the thesis followed by the District Court, or the conclusion drawn therefrom.

Kronick, supra, is in no way apposite to the present proceedings. In the first place, *Kronick* did not raise the point urged here. Second, the record discloses in *Kronick*, that during the criminal case which was a prelude to the civil action, Kronick testified fully and was characterized by his attorney as a “key” Government witness in the proceedings. Following the criminal case, Kronick was subpoenaed by the United States as an adverse witness in civil proceedings and commenced his testimony as the Government’s first witness. Kronick at no time raised the claim of privilege against

self-incrimination. He invoked the Fifth Amendment solely because he feared that his testimony might be the basis for a perjury indictment.

Certainly, this Court in *Kronick*, spoke only to the situation and circumstances presented in that case.

“Nor does Kronick contend that the immunity provided by Section 32 is inapplicable in the pending civil action because only the second of the two claims involved in the suit invoked the anti-trust laws, the first, an alternative, claim being brought under the Federal Property and Administrative Services Act of 1949. Such a contention would be without merit. The proof necessary to sustain both claims is substantially identical and Kronick’s testimony was not separated as between the two claims. Under these circumstances it must necessarily be assumed that all of his testimony is germane to the anti-trust claim and is therefor protected by Section 32” (p. 441).

Kronick, in any event, by testifying, waived any right to invoke the Fifth Amendment. And the record and testimony available to the Court might sustain the Court’s determination that the claims in *Kronick* were substantially identical. In the present case, Rutherford has not testified in any judicial proceeding. He has invoked the Fifth Amendment guarantee against incrimination, and he has urged that in the circumstances—the substantial difference of proof between the anti-trust and false claims statutes—he must perforce invoke his immunity against being required to testify in the false claims action. It seems to us that if in proof of a false claims violation a crime is shown to have been committed subsequent to Rutherford’s testimony before the Grand Jury, or some link is laid bare which leads to proof connecting Rutherford with a

crime, he is not protected by the Grand Jury immunity. And 15 U.S.C. 15(a) not being an "enforcement" proceeding, appellant is doubly subject to hazard for any testimony elicited, which may show connection with a transaction or act constituting a crime and occurring subsequent to the Grand Jury testimony.

In *United States v. Schmidt*, 204 F. Supp. 540 the Court made it clear that in a false claims action the United States is required to prove fraud in its accepted sense. Thus, there must be a false representation of a material fact, for without such proof there could be no recovery under the False Claims Act. The Government, of course, must rely on the misrepresentation. Neither could the Government prevail unless it showed that there was an intent to deceive. Conscious parallelism would not be the basis of a claim under the False Claims Act. *United States v. National Wholesalers*, (C.A. 9) 236 F. 2d 944).

Unless this Court can say in the present state of the record, that the proof necessary to sustain a claim here made under the False Claims Act and a claim here made under the Anti-Trust Act, is substantially identical, it must sustain appellant's claim.

POINT III.

Government contends that appellant's testimony in the pending civil case is given a new and independent immunity under 15 U.S.C. 32 commensurate with the scope of that testimony. Thus, it is argued that the scope of appellant's prior Grand Jury testimony is irrelevant to his obligation to testify under the District Court's order.

We cannot conceive that the scope of claim to immunity here if extended by 15 U.S.C. 32, would be commensurate with testimony that elicited from the witness evidence leading to proof, or a link in proof, of the commission by the witness of acts or crimes following the period of time during which it is claimed in Count I that false claims violations occurred.

In *United States v. Johns-Manville Corp.*, 213 F. Supp. 65, three defendants had testified in 1958 pursuant to subpoenas, before a Federal Grand Jury which was investigating the cement-asbestos pipe industry. Thereafter, and in 1962, an indictment was returned by another Federal Grand Jury against the defendants. Defendants' claim of immunity was denied. The court held that any immunity which attached as a result of 15 U.S.C. Sec. 32, would not cover any conspiracy or conspiratorial acts subsequent to 1958, and that the record itself did not justify "... the assumption that the matters covered in such testimony were 'substantially connected with the transactions in respect of which (these defendants) testified' in April 1958" (p. 75). How then can the immunity statute grant a "new and independent immunity" to testimony of the appellant which involved him in crimes committed subsequent to and following the time, events and proof covered by the false claims count?

If immunity, as claimed by Government, is granted appellant, "commensurate with the scope of his forthcoming testimony in the civil case," and the scope of his testimony as the result of direct, cross-examination or otherwise, details facts which "link" the appellant

with the commission of crimes subsequent to the time, events and proof covered by the civil count, the immunity granted is without limit. Such a contention cannot be sustained, and the apprehension of danger by the appellant is just as real as he asserts.

CONCLUSION

We respectfully submit to the Court that the argument heretofore submitted in the Opening Brief is valid and justifies reversal of the order of the District Court.

Respectfully submitted,
R. MAX ETTER,
Attorney for Appellant

CERTIFICATE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. MAX ETTER

